88-1367

NO. 88 - _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE A. G. BOONE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL UNION NO. 171, *etc.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Has the Court of Appeals improperly allocated to an employer respondent the ultimate burdens of proof and persuasion upon issues of discriminatory intent and of "pretext" arising from its business decisions, without concluding, as the National Labor Relations Act commands, that all allegations of discriminatory intent were proved by a preponderance of evidence?

PARTIES TO THE PROCEEDING[1]

All parties to the proceedings below are named in the caption.

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[1] In compliance with Rule 28.1, according to information supplied to counsel for The A. G. Boone Company, it is affiliated with **A. G. Boone Sales & Service Co.** in the sense that the corporations have common private ownership.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT	4
A. Proceedings Below	4
B. The Factual Background ..	7
REASONS FOR GRANTING THE WRIT ..	18
The Court of Appeals Has Decided a Federal Question in a Way in Conflict with Applicable Decisions of this Court or Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by this Court	18
A. The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent without Requiring Proof of a **Prima Facie** Case of Such Intent by a Preponderance of Evidence	18

B. The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent in the Decision of "Pretext" Issues 29

CONCLUSION 39

TABLE OF AUTHORITIES

Cases:

N.L.R.B. v. Gateway Theatre Corp., 818 F.2d 971 (D.C. Cir. 1987) 34

N.L.R.B v. Transportation Management Corp., 462 U.S. 393 (1983) 18, 20,21, 23,24, 31,32

Possaic Daily News v. N.L.R.B., 736 F.2d 1543 (D.C. Cir. 1984) . 34

Southwire Co. v. N.L.R.B., 820 F.2d 453 (D.C. Cir. 1987) .. 34

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 31, 35,36, 37,39

United Food Workers I. Union v. N.L.R.B., 768 F.2d 1463 (D.C. Cir. 1985) 34

Statutes:

28 U.S.C. §1254(1) 2

National Labor Relations Act,
29 U.S.C. §151 et seq.,

§8(a)(3),
29 U.S.C. §158(a)(3) ..... 3, passim

§10(c),
29 U.S.C. §160(c) 3, 21

§10(e)&(f),
29 U.S.C. §160(e)&(f) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the District of Columbia Circuit, to the end that the Court may review a decision rendered by the Circuit Court in a case involving the parties above-named,

and the Petitioner respectfully shows to the Court:

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet officially reported but may be found in the Appendix filed herewith (Pet. App. 1-26).[2] The Decision and Order of the National Labor Relations Board in **The A. G. Boone Company (Teamsters Local Union No. 171, etc.)** likewise is not yet officially reported but is designated as 285 N.L.R.B. No. 133 (1987) and may also be found in said Appendix (Pet. App. 27-165).

JURISDICTION

The Opinion of the Circuit Court was entered on December 9, 1988 (Pet. App. 1-26). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the Court of Appeals rested upon 29 U.S.C. §160(e)&(f).

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[2] "Pet. App." refers to the Appendix filed with this Petition.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. §151 **et seq.**) ("the NLRA") are as follows:

Section 8(a)(3), 29 U.S.C. §158(a)(3), provides in pertinent part:

> **§158. Unfair labor practices**
>
> (a) It shall be an unfair labor practice for an employer --
>
> ...
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to ... discourage membership in any labor organization.

Section 10(c), 29 U.S.C. §160(c), provides in pertinent part:

> **§160. Prevention of unfair labor practices**
>
> ...
>
> (c) ... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue ... an order.

STATEMENT

A.

Proceedings Below

In June, 1986, a Regional Director of the National Labor Relations Board (hereinafter "the Board") caused the initial Complaint to be filed in this case. That Complaint, as subsequently amended, alleged that The A. G. Boone Company (hereinafter "A. G. Boone") had committed various unfair labor practices in the course of and following a successful union organizational campaign by Teamsters Local Union No. 171 (hereinafter "Local 171").

By allegations most pertinent to the issues presented by this Petition, the Complaint asserted that A. G. Boone's decisions to relocate its Virginia terminal by thirty-seven miles and, on three separate occasions, to lay off numbers of its Virginia employees, were motivated by

unlawful discriminatory intent, and thus violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3). A. G. Boone denied these allegations, and a hearing was conducted before an Administrative Law Judge on October 7 and 8, 1986.

On December 31, 1986, the Administrative Law Judge issued a Decision finding and concluding that A. G. Boone's terminal relocation and its three layoff decisions were motivated by unlawful discriminatory intent (Pet. App. 115-149). A. G. Boone filed exceptions to these findings and conclusions with the Board.

By its Decision and Order dated September 24, 1987, a Board panel affirmed the discriminatory intent findings and conclusions relative to A. G. Boone's relocation and layoff decisions (Pet. App. 32-40). The Board's Chairman dissented,

stating that the record evidence did not support findings and conclusions that the two earliest layoff decisions were unlawfully motivated (Pet. App. 46-51).

Upon A. G. Boone's petition for review of the Board's Decision and Order, and upon the Board's cross-petition for enforcement of its order, a panel of the Court of Appeals for the District of Columbia Circuit ruled that the evidence supported findings of unlawful motivation in A. G. Boone's relocation decision and in two of its layoff decisions but not in its earliest layoff decision (Pet. App. 1-26).

A. G. Boone now respectfully petitions this Court to review the decision of the Circuit Court upon the discriminatory intent issues arising from the Company's terminal relocation and layoff decisions.

B.

The Factual Background

A. G. Boone for many years has been a contract carrier in the southeastern United States, specializing in the transportation of groceries and related items. The Company's headquarters and principal terminal are in Charlotte, North Carolina. As a contract carrier, A. G. Boone performs transportation services for a limited number of customers, primarily grocers and food distributors.

In 1979, A. G. Boone opened a trucking terminal in Montvale, Virginia, on the outskirts of Roanoke, to perform services both for a Kroger bakery in Roanoke and for a Kroger dairy about thirty-seven miles away, at Lynchburg, Virginia.

In May and June, 1986, the Company made decisions to lay off numbers of its

Virginia-based employees, and such layoffs were implemented in May, June, and August, 1986. At the time of the June layoff decisions, A. G. Boone made a concurrent but logically and factually unrelated decision to relocate its Montvale/Roanoke terminal operations to Madison Heights, Virginia, a Lynchburg suburb.

The Circuit Court has enforced those portions of the Board's Decision and Order which are based upon findings and conclusions of discriminatory motivation in the Company's June, 1986 decisions to lay off Virginia employees and its separate decision to relocate its terminal operations to the Lynchburg vicinity.

Those June, 1986 layoff and relocation decisions followed an unexpected permanent closing of Kroger's Roanoke bakery, which was effected by Kroger without any warning or notice to A. G. Boone.

After the Roanoke bakery closing, the Company was left with only a single Virginia account, namely the Kroger dairy at Lynchburg.

Prior to the Roanoke bakery closing, Local 171 had been certified as the statutory collective-bargaining representative of the Company's Virginia unit employees. It is most relevant and significant, however, that Local 171 did not even begin its organizing efforts until early in the year 1986.

Although such organizing efforts did not begin until early 1986, a witness for the General Counsel admitted that A. G. Boone repeatedly had specified "in one or more general meetings, over the course of the past three years", that the Company "possibly" would "close" the Montvale terminal "if it loses the bakery."

In response to the Roanoke bakery closing, A. G. Boone decided immediately to lay off four Roanoke drivers and one utility employee. In the context of this layoff decision, another witness for the General Counsel, who also was a Local 171 officer, testified that either three or four drivers had been needed to accomplish the Roanoke bakery work. When, after the Roanoke bakery closing, the amount of Lynchburg dairy work increased, two of the laid off drivers promptly were recalled to work at the Montvale/Roanoke terminal.

After and because of the bakery closing, and when that business had been lost (as had been feared for at least three years), A. G. Boone, instead of **closing** the Montvale/Roanoke terminal -- as it repeatedly had specified it "possibly" would do -- actually decided to **relocate** its Virginia terminal operation

to Lynchburg/Madison Heights, the site of its only remaining Virginia account, Kroger's Lynchburg dairy. After making this relocation decision, the Company selected and leased a terminal facility in the Lynchburg area. Thus, the relocation of the terminal operation was not effected until August, 1986.

As the Administrative Law Judge observed, A. G. Boone could have decided to conduct its operations from the new Lynchburg-area terminal site with the same or a similar complement of drivers that had been employed at the Montvale/Roanoke site. Lynchburg, like Roanoke, also is within Local 171's territorial jurisdiction, the Company's Virginia drivers still reported for work in the same general vicinity, and the Company, after the relocation, continued to recognize Local 171 as the representative of its Virginia employees.

A. G. Boone put into the record uncontradicted evidence that the terminal relocation would save Kroger approximately Eighty Thousand Dollars per year in mileage costs. Kroger, in previous years, had been sensitive to its transportation costs and previously had demanded of and received from A. G. Boone a reduction in its charges for the bakery work. The annual savings to Kroger undeniably made A. G. Boone more competitive in its efforts to retain or expand its work for the Lynchburg dairy.

It is clear that none of A. G. Boone's foregoing, uncontradicted reasons for relocating its Virginia terminal operations had anything to do with the question of how many employees it would employ at the new terminal site. The relocation decision indisputably was factually and logically unrelated to the contemporaneous

layoff decision. There is no record evidence that the Company's decision to relocate its terminal operations had anything to do with its layoff decision or that there could have been discriminatory motivation for the terminal relocation.

As above specified, A. G. Boone, after the Roanoke bakery closing, might have decided to employ the same or substantially the same number of Virginia employees at a new terminal location near the Lynchburg dairy, which was the only remaining Virginia account. At the time of the bakery closing, however, the Company admittedly needed three or four fewer Virginia drivers, that number of drivers' work concededly having been devoted to bakery "hauls". A. G. Boone decided, upon the bakery closing, that it could perform the Virginia work without four of the pre-closing complement of drivers and without

one utility man and laid off that number of employees. When, however, the dairy work after the bakery closing exceeded expectations, the Company promptly recalled two of the laid-off drivers. Indisputable evidence establishes that the Company experienced diminished profits after the bakery closing and that, but for the layoff, it would have experienced a much greater profit loss. Indeed, the Company's Virginia net profits were virtually eliminated when the two drivers were recalled. Upon these facts, the Board found and concluded, and the Circuit Court upheld the finding and conclusion, that the June, 1986 layoff of four drivers and a utility man was unlawfully motivated.

In addition to its decisions immediately after the bakery closing to relocate the Virginia terminal to the site of the Lynchburg dairy and to lay off four

drivers and a utility man, the Company also decided that, upon effecting the terminal relocation, it would substantially reduce the Virginia workforce that had been employed at the Roanoke terminal location. As has been described above, the decisions, upon the bakery closing, immediately to lay off five employees and to relocate the terminal in no way dictated or even influenced the separate decision to "scale down" the entire Virginia operation, utilizing substantially fewer Virginia-based employees.

Independent of the admitted fact that fewer drivers were needed after the bakery closing, and independent of the substantial savings and competitive advantage resulting from the terminal relocation, the Company presented uncontradicted evidence of very substantial, legitimate, and separate business reasons

for a significantly "scaled down" Virginia operation. The Company introduced uncontradicted evidence that annual cost savings in excess of $100,000.00 would result from its decision to "scale down" its Virginia terminal operations. Such savings resulted from eliminating supervisory employees, from reducing equipment needs and equipment maintenance costs, from eliminating terminal improvements and repairs costs, and eliminating or substantially reducing layover expense reimbursements. Again, such annual cost savings were in addition to the $80,000.00 annual mileage cost savings to Kroger resulting from the relocation of the terminal to Lynchburg.

Both the Board Decision and Order and the Circuit Court Opinion fail to address or even mention the Company's uncontradicted evidence of $100,000.00 annual cost savings resulting from the

decision to "scale down" its Virginia operations.

Instead, upon the foregoing evidence, the Board found and concluded that A. G. Boone's decisions to relocate its Virginia terminal to Lynchburg, to lay off five employees after the Roanoke bakery closing, and to lay off additional employees in connection with a "scaled down" Virginia operation, all were discriminatorily, and therefore unlawfully, motivated. And beyond enforcing the Board's order that all the laid-off employees be reinstated with backpay, the Circuit Court also enforced the Board's order that all such employees be reinstated at a reopened Montvale/Roanoke terminal.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided a Federal Question in a Way in Conflict with Applicable Decisions of this Court or Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by this Court

A.

The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent without Requiring Proof of a Prima Facie Case of Such Intent by a Preponderance of Evidence

The Court should review and reverse the Court of Appeals' decision because it erroneously applies the Board's allocation of evidentiary burdens in an unfair labor practice case presenting discriminatory intent issues, as such allocation has been approved in **N.L.R.B v. Transportation Management Corp.**, 462 U.S. 393 (1983).

The Court of Appeals' fundamental error is shown by the following quotation from its Opinion:

> The Company's early open hostility toward Union activity, and its 8(a)(1) violations, are clearly sufficient to establish a **prima facie** case that antiunion considerations were a motivating factor in **[all of?]** its decisions. Thus, under the **Wright-Line** test, once the **General Counsel made this showing**, the **burden** shifted to the Company **to prove** that it would have taken the same actions even in the absence of the protected conduct **[Emphasis added]** (Pet. App. 20).

Under the above-quoted application of the Board's **Wright-Line** allocation of evidentiary burdens, the Circuit Court **only** examines the evidence upon **some** of the unfair labor practice allegations, which did **not** present issues of discriminatory intent, to determine whether the the General Counsel proved a **prima facie** case upon **all** the unfair labor practice allegations in the case, including unfair labor practice allegations that **did** present issues of discriminatory intent. Relying only upon evidence of alleged threats to **close** the Montvale/Roanoke

terminal if the Union won the representation election and upon other evidence of antiunion animus that **predated** the Company's decisions to **relocate** its Virginia terminal and to lay off employees, the Circuit Court holds that the burden of **proof** shifted to the respondent employer on the allegations of discriminatory motivation in the terminal relocation and layoff decisions. Such holding misinterprets and misapplies the Court's **Transportation Management Corp.** decision.

In **Transportation Management Corp., supra**, the Court has stated that the question of whether the General Counsel has proved a **prima facie** case is to be determined upon the preponderance of the evidence, necessarily meaning **all** of the evidence:

> The Court of Appeals was quite correct, and the Board does not disagree, that throughout the proceedings, the General Counsel carries

> the burden of proving the elements of an unfair labor practice. Section 10(c) of the Act, 29 U.S.C. §160(c), expressly directs that violations may be adjudicated only "upon the preponderance of the testimony" taken by the Board. The Board's rules also state that "[t]he Board's attorney has the burden of pro[ving] violations of Section 8." 29 CFR §101.10(b) (1982). ...
>
> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus -- **or, as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under §10(c) [by the preponderance of the testimony].** But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends what the Board considers to be an affirmative defense but does **not change** or add to the elements of the unfair labor practice that the General Counsel **has the burden of proving under §10(c). [Emphasis added]**

N.L.R.B. v. Transportation Management Corp., supra, 462 U.S. at p. 401.

The Circuit Court clearly has held that the General Counsel sustained the burden of proving that discriminatory intent "was a substantial or motivating factor" in A. G. Boone's layoff and relocation decisions without even addressing A. G. Boone's stated reasons for those decisions. As shown above, the Circuit Court holds that the General Counsel proved unlawful motivation in those decisions by merely and only proving antiunion animus in other contexts and without any examination of A. G. Boone's articulated reasons for its layoff and relocation decisions. The "substantial or motivating factor" element of the General Counsel's case has been deemed proved without any weighing of "the preponderance of the testimony" relative to the reasons for the layoff and relocation decisions.

The "affirmative defense" acknowledged by the Board in **Wright-Line** and by this Court in **Transportation Management Corp.** should be at issue only when unlawful motivation is admitted or when there is a "preponderance" of evidence that discriminatory intent "was a substantial or motivating factor" in relation to a particular decision. And only when there is such admission or "preponderance" of evidence should there be any **employer** burden of proof.

In A. G. Boone's case, the "direct" evidence of **antiunion animus** upon which the Circuit Court relies either predates, or relates to actions separate from, the Company's layoff and relocation decisions. A. G. Boone indisputably offered uncontradicted "direct" evidence of lawful and justifiable business reasons for its decisions. **At the very least, the Board and**

the Circuit Court should have weighed the "preponderance" of all the direct and the indirect evidence on the layoff and relocation issues before concluding that the General Counsel proved a prima facie case on those issues and that A. G. Boone had the burden of proof on an affirmative defense. It is manifest that neither the Board nor the Circuit Court weighed such evidence.

It is a commonplace that a prima facie case permits a finding in favor of the party who proves such a case. Under this Court's above-quoted holding in Transportation Management Corp., the Board's General Counsel has the burden of proving a prima facie case by a preponderance of evidence, and one element of that case as to the layoff and relocation decisions is that discriminatory intent was a substantial or motivating factor in the

employer's actions. By holding, without pretending to weigh all the evidence on the layoff and relocation issues, that the General Counsel proved a **prima facie** case on those issues, and upon such holding, by imposing upon A. G. Boone burdens of proof and persuasion, the Circuit Court has ignored this Court's specification of the case that the General Counsel must prove.

In its Statement of "The Factual Background" (pp. 7-17 of this Petition), A. G. Boone has set forth the uncontradicted and unrebutted business reasons it "articulated" for its layoff and relocation decisions. Although such evidence clearly outweighed evidence of antiunion animus that either predated, or related to actions other than, A. G. Boone's layoff and relocation decisions, it has been totally ignored by both the Board and Circuit Court upon mere recitation of the

erroneous legal proposition that A. G. Boone had burdens of proof and persuasion on the issues relative to the layoffs and relocation. And even if such burdens properly were imposed upon A. G. Boone, it should, upon this Court's review of the case, be held that the Company sustained them.

It is most evident that discriminatory intent could not have been "a substantial or motivating factor" in the Company's decision to relocate its Virginia terminal. The same employees clearly could have been employed at the nearby new terminal facility, which like the old terminal is within Local 171's territorial jurisdiction, and A. G. Boone has continued to recognize Local 171 as the representative of the employees at the new terminal location. The Company also proved uncontradicted and undeniable business

reasons for the relocation. Nevertheless, the Circuit Court enforces the Board's Order that all the laid-off employees be offered employment at the old Montvale/ Roanoke terminal facility.

Similarly, A. G. Boone proved uncontradicted and undeniable business reasons for its decisions to lay off five employees after the bakery closing and to "scale down" substantially its Virginia operations.

A Local 171 officer, who was a witness for the General Counsel, admitted that either three or four Virginia drivers had been assigned to bakery "runs", and the Company's decision was to lay off four drivers and one utility man when Kroger, without notice, permanently closed its bakery. The fact that A. G. Boone promptly recalled two of the laid-off drivers, when business following the bakery closing

exceeded expectations, tends to disprove rather than prove unlawful discriminatory motivation.

The Company's evidence that its decision to "scale down" its Virginia operations -- utilizing fewer Virginia-based employees -- would result in annual cost savings in excess of $100,000.00 was neither contradicted nor rebutted. Again, these savings were in addition to the $80,000.00 annual cost savings resulting from the separate terminal relocation decision. Nevertheless, such evidence is nowhere mentioned either by the Board's Decision and Order or by the Circuit Court's Opinion. Again, upon mere recitation that a burden of proof was imposed upon A. G. Boone, and without weighing the preponderance of the evidence as to the reasons for the "scaled-down" Virginia operations, the Court of Appeals has

affirmed the Board's findings and conclusions that discriminatory intent was "a substantial or motivating factor" in the Company's decision.

B.

The Circuit Court Improperly Has Enforced a Board Order Based upon Findings and Conclusions of Discriminatory Intent, Imposing a Burden of Proof on the Respondent in the Decision of "Pretext" Issues

As has been demonstrated above, the Circuit Court clearly has not weighed all the evidence to ascertain whether or not the Board's General Counsel proved a **prima facie** case of unlawful discriminatory motivation by a preponderance of direct or indirect evidence.

Indeed, as A. G. Boone has contended, there is no **direct** evidence of discriminatory intent influencing the Company's terminal relocation and layoff decisions. The evidence which the Court of

Appeals states established the General Counsel's **prima facie** case consists only of indirect evidence, because it relates to antiunion animus in contexts other than the Company's terminal relocation and layoff decisions (See quotation from the Circuit Court's Opinion at p. 19 of this Petition).

As also has been shown above, A. G. Boone undeniably offered **direct** evidence of entirely lawful motivation for its terminal relocation and layoff decisions, "articulating" clearly legitimate, nondiscriminatory reasons for those decisions. As the Company has argued, the Court of Appeals clearly did not weigh the preponderance of the direct or indirect evidence in its holding that a burden of proof was imposed upon A. G. Boone.

The Company respectfully asserts that, under the decisions of this Court,

there is no employer respondent burden of proof or persuasion except when unlawful motivation is proved by a preponderance of direct and indirect evidence or when such motivation admittedly contributed to the employer's action. Under this Court's decisions, when there is only indirect evidence of unlawful motivation, the employer only has a burden of going forward with evidence "articulating" a legitimate, nondiscriminatory reason for the action or decision in question.

> The Board has not purported to shift the burden of persuasion on the question of whether the employer fired Santillo **at least in part** because he engaged in protected activities. The General Counsel satisfied his burden in this respect and **no one disputes** it. Thus, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 ... (1981), is inapposite. In that case, which involved a claim of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, [citation omitted] the question was who had "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated

> against the plaintiff ... ." [citation omitted] The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision. **It thus addressed the pretext case. [Emphasis added]**

N.L.R.B. v. Transportation Management Corp., supra, 462 U.S. at p. 400, n. 5.

In this case, of course, A. G. Boone definitely "disputes" and has disputed the question of whether the General Counsel, by a preponderance of evidence, "satisfied his burden" of proving that the Company made its terminal relocation and layoff decisions "at least in part because [its employees] engaged in protected activities."

As shown by the above quotation from this Court's **Transportation Management** decision and the body of the Court's opinion to which the quoted footnote relates, a burden of proof or persuasion upon an affirmative defense should be

imposed upon an employer respondent only in "dual motive" cases where the existence of unlawful motivation is conceded or is proved by a preponderance of evidence. The proof of unlawful motivation by a preponderance of evidence, of course, necessarily means that the burdens of proof and persuasion are imposed upon the General Counsel. The Court, as quoted above, clearly has specified that, upon "pretext" issues, the ultimate burdens of proof and persuasion at all times remain with the General Counsel.

In this case, and in previous cases, the Court of Appeals for the District of Columbia Circuit clearly but improperly has decided "pretext" issues, as well as "dual motive" issues, in accordance with the **Wright-Line** imposition of a respondent's burden of proof upon an affirmative defense.

> Nor do the Company's economic records evidence anything but that its asserted economic defense is a mere pretext in this context (Pet. App. 21).

See also, **Southwire Co. v. N.L.R.B.**, 820 F.2d 453 (D.C. Cir. 1987); **N.L.R.B. v. Gateway Theatre Corp.**, 818 F.2d 971 (D.C. Cir. 1987); **United Food Workers I. Union v. N.L.R.B.**, 768 F.2d 1463 (D.C. Cir. 1985); and **Possaic Daily News v. N.L.R.B.**, 736 F.2d 1543 (D.C. Cir. 1984).

The question in an unfair labor practice case arising under §8(a)(3) of the National Labor Relations Act is whether an employer was motivated by an intent to discriminate against an employee to discourage the employee's protected activity when the employer took an adverse employment action. The question in a Title VII employment discrimination case is whether an employer was motivated by an intent to discriminate against an employee because of the employee's race, sex, et

cetera, when the employer took an adverse employment action.

In a Title VII case, even when a plaintiff has proved a **prima facie** case, the defendant employer may prevail upon a showing of legitimate, non-discriminatory reasons, other than race, sex, **et cetera**, for an adverse employment action. The employer's burden of so showing, however, is only a burden of production or of going forward with evidence, and the burdens of proof and persuasion at all times remain with the plaintiff. See **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 (1981).

It is respectfully suggested that there is no rational or logical basis for holding that an employer defendant in a Title VII case has only a burden of production when such employer seeks to establish a legitimate, non-discriminatory

reason for an employment decision but that a §8(a)(3) employer respondent has burdens of proof and persuasion when such employer seeks to establish that he made a particular employment decision for legitimate, non-discriminatory business reasons. In **Texas Department of Community Affairs**, the Court held that the federal courts may not impose upon an employer defendant any burden of proof or persuasion even though an employee plaintiff has proved a **prima facie** case, albeit such proof would permit a finding in favor of the plaintiff.

It seems even less appropriate to permit the National Labor Relations Board, under the guise of statutory interpretation, to impose such burdens upon the mere proof of a **prima facie** case.

Again, in a §8(a)(3) unfair labor practice case, the motivational issue is whether or not "**the employee's protected**

conduct was a substantial or motivating factor in the adverse action." Under the holding of **Texas Department of Community Affairs**, an employer respondent in a §8 (a)(3) unfair labor practice case should have no burden of proof or persuasion on that issue, and the National Labor Relations Board should impose upon the General Counsel the burdens of proof and persuasion both in establishing a **prima facie** case and in any showing that the employer respondent's "articulated" reasons for an employment decision are pretextual.

It is respectfully asserted that findings and conclusions of discriminatory intent in §8(a)(3) unfair labor practice cases should be made, entered, and reviewed in accordance with the **Texas Department of Community Affairs** analytical framework. A. G. Boone denied that discriminatory

intent motivated its layoff and relocation decisions and offered evidence of legitimate business reasons for those decisions. The Company's evidence, instead of being weighed against the General Counsel's evidence, has been ignored on the theory that the Company had the burden of proof as to the true reasons for its decisions.

To the extent that the National Labor Relations Board also extends to employer respondents an affirmative defense, even when the record evidence justifies findings and conclusions of discriminatory intent, if the employer is able to show that the same action would have been taken regardless of such intent, the imposition upon the employer of a burden of proof would appear proper. On the issue of whether or not substantial record evidence supports findings and conclusions of discriminatory intent, however, which

was presented by A. G. Boone's petition for review of the National Labor Relations Board's Decision and Order, the Circuit Court's review should have been in accordance with this Court's allocation of the ultimate burden of proof as specified in **Texas Department of Community Affairs.**

Upon such proper review, A. G. Boone's showing of uncontradicted business reasons for its terminal relocation and layoff decisions would have resulted in denial of enforcement of the Board's remedial orders relative to those decisions.

CONCLUSION

A. G. Boone's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Lloyd C. Caudle
William L. Auten

Attorneys for the Petitioner

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NO. 88 - _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE A. G. BOONE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and
TEAMSTERS LOCAL UNION NO. 171, *etc.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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TABLE OF CONTENTS

	Page Number
Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on December 9, 1988	1-26
Decision and Order of the National Labor Relations Board in **The A.G. Boone Company (Teamsters Local Union No. 171, etc.)** entered on September 24, 1987	27-57
Decision of the Administrative Law Judge in **The A.G. Boone Company (Teamsters Local Union No. 171, etc.)** filed on December 31, 1986	58-165

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 7, 1988 Decided December 9, 1988

No. 87-1522

TEAMSTERS LOCAL UNION No. 171, Affiliated With the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Lloyd C. Caudle, with whom, *William L. Auten* was on the brief for petitioner, petitioner A.G. Boone Company.

Kathleen A. Murray, with whom, *Jonathan G. Axelrod* was on the brief for petitioner/intervenor, Teamsters

Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *John R. Mooney* also entered an appearance for petitioner/intervenor Teamsters Union Local No. 671.

William R. Stewart, Deputy Assistant General Counsel, N.L.R.B., with whom *Aileen A. Armstrong*, Deputy Associate General Counsel and *Nancy B. Hunt*, Attorney, N.L.R.B. were on the brief for respondent. *Suzanne Stocking* and *Nancy Hunt*, Attorneys, N.L.R.B. also entered appearances for the respondent.

Before: EDWARDS, WILLIAMS and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: On September 24, 1987, the National Labor Relations Board ("NLRB" or "Board") issued a Decision and Order finding A.G. Boone Company ("Company") guilty of a number of unfair labor practices in violation of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(1), (3) and (5) (1982). In particular, the Board found that the Company had refused to bargain in good faith with Teamsters Local Union 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 171" or "Union"); had unilaterally changed employees' conditions of employment without first notifying and bargaining collectively in good faith with the Union; had discouraged membership in and activities on behalf of the Union; had interrogated employees concerning their Union activities; and had transferred bargaining unit work, laid off and discharged bargaining unit employees and closed the Company's terminal at Montvale, Virginia in order to take reprisal against employees for engaging in Union activities. The Board ordered the Company to resume operations at the

closed terminal and to reinstate its laid-off and discharged employees with backpay. The Board refused, however, to include a visitatorial (information gathering) clause remedy in its final Order.

The Union and the Company are now before the court on separate petitions for review: the Union challenges the Board's refusal to include a visitatorial clause remedy in its Order, and the Company challenges the Board's findings of unfair labor practices. The Board has filed a cross-application for enforcement of its Order. With one exception, the Board's judgments are supported by substantial evidence on the record as a whole; therefore, we grant in significant part the Board's cross-application for enforcement and deny for the most part the Company's petition for review. On the Union's petition for review, we remand for further consideration by the Board. We find it unnecessary to decide whether the Company violated section 8(a)(5) when it failed to bargain over the *decision* to relocate part of its business.

I. Background

For many years, the Boone Company has been a contract carrier in the southeastern United States specializing in the transport of groceries and related items. A.G. "Bud" Boone is the owner and president of the Company. Its headquarters and principal terminal are in Charlotte, North Carolina. As a contract carrier, the Company hauls for a limited number of customers, including the Kroger food chain and Kroger subsidiaries, the A&P Tea Company, Winn-Dixie, White House Foods and Chandler Foods.

A. *The Board's Findings of Fact*

In 1979, the Company opened a terminal in Montvale, Virginia to service a Kroger subsidiary, Westover Dairy, in Lynchburg, Virginia. Eventually, many of the West-

over Dairy runs were handled by Montvale drivers. Montvale drivers also hauled some bakery products from Kroger's large bakery at Roanoke, Virginia, until 1986 when the bakery closed; and they hauled fruit juice and other items on backhauls to Kroger's Roanoke suburban warehouse in Salem, Virginia.

The Union did not begin any serious effort to organize the Montvale drivers until early 1986. However, well before the advent of a union, employees were warned against union activity. Two Montvale drivers testified that when they were hired in 1981 and 1982, respectively, they were told of Boone's intention to operate the Montvale terminal as a nonunion facility; the Assistant Terminal Manager, Thomas J. "Jack" Dickenson, told them that if a union ever came into the Montvale terminal, it would be closed. The Administrative Law Judge ("ALJ") described this testimony as "credible." Joint Appendix ("J.A.") 927.

An election was scheduled for April 13, 1986, when Boone refused to recognize the Union without one. While the election campaign was in progress, Kroger provided the Company with some additional business, approximately 20,000 hauling miles per week, in the form of flower delivery runs from the Kroger warehouse in Simpsonville, South Carolina. The Company assigned about a third of this work to the Montvale terminal but did not hire any additional drivers at Montvale to do the work. J.A. 927-29. However, another driver testified that, about a week before the flower runs were scheduled to begin, the Montvale Terminal Manager, James McGalliard, told him and another driver that if the Union was voted in, "the flowers will be the first thing to go," J.A. 155, and that Bud Boone had already told McGalliard that "he wasn't going to give Local 171 one red cent of his money." *Id.*

In the proceedings before the ALJ, drivers repeatedly testified that members of Company management told

them that the Company would close the Montvale terminal if the Union came in. Shortly before the election, Assistant Manager Dickenson told two drivers to "try to talk the Union down because if the Union (was) voted in, Mr. Boone would lock the gate." J.A. 928. Terminal Manager McGalliard told a driver that "if the Union came in, they would close the terminal and he would go back to Charlotte," and was also overheard by one driver telling another driver that "if the Union came in, the drivers would probably be out of a job." *Id.* Dickenson also told a driver that he knew of five drivers "in on this union deal," and that as soon as he found out who the sixth driver was, he would "fire the s.o.b." *Id.*

Just before the election, McGalliard asked one driver if he knew anything about the "union business." The driver replied that he could not tell McGalliard anything. McGalliard then said that Boone always "seemed fair" to the employees, and it seemed as if the Company treated "you fellows fair." But, he added, "if the [U]nion comes in, I got the lock." *Id.* Ultimately, the Montvale drivers and maintenance employees nonetheless voted to be represented by Local 171, which was certified by the Board on April 28. J.A. 927.

Flower runs from Simpsonville had begun on March 2 as scheduled, but Kroger soon became dissatisfied with the Montvale drivers' deliveries because of problems including damaged flowers and late deliveries. On about April 15, when Kroger decided to forego the hoped-for savings of hauling flowers out of Montvale, the Company began to haul flowers from Simpsonville with drivers from its Anderson, South Carolina, terminal. J.A. 928-29, 942.

A few days after the election, however, Dickenson told two different drivers that Montvale drivers would not be handling any more flower runs because the Union had been voted in, and that the Company had transferred

the work to the nonunion Anderson terminal because it did not want any union drivers coming into Simpsonville. When one driver said that this sounded like a big joke, Dickenson replied, "You can call it a joke if you want to, but I think it's pretty serious." J.A. 929. In addition, on April 21, the Company reassigned six milk runs per week, going from Kroger's Westover Dairy at Lynchburg to Savannah, Georgia, from Montvale drivers to Charlotte-based drivers. The purpose of this reassignment was to accommodate a new run that the Company had picked up from A&P, hauling food from Charlotte to Greensboro. The dairy runs had amounted to 2,700 miles per week for two Montvale drivers. *Id.* Shortly thereafter, on May 3, 1986, the Company sent identical letters to the two Montvale drivers with the least seniority, notifying them that they were laid off for lack of work. *Id.*

On about June 13, Kroger closed its Roanoke bakery. Kroger gave the Company only a few days notice of this closing, which depleted the Company's workload. J.A. 930. On June 13, the Company "terminate[d]" the four must junior drivers and one utility man "[b]ecause of a permanent loss of a portion of [the] business at the Montvale facility . . . ." *Id.*

Meanwhile, Company and Union officials met to discuss conditions of employment at Montvale. From the outset, however, Company management indicated an unwillingness to negotiate in good faith with Local 171. In early May, Assistant Manager Dickenson told one driver that Boone would not negotiate a contract with the Union. He said that what was going to take place would resemble the events at a nearby Pepsi Cola plant where the drivers voted to unionize, but the employer had dragged out negotiations for five years without agreeing to a contract. Dickenson then cut himself short, stated that perhaps he had said too much, and walked away. J.A. 930.

The first of five meetings between Company and Union officials took place in Roanoke on June 17, just four days after the shutdown of the Kroger bakery and the layoff of the five Montvale employees. Boone opened the meeting by presenting the Union Secretary-Treasurer, Jim Guynn, with a notice that had been posted at the terminal the same day. The notice stated that the Montvale operation would "be closed in the near future" due to the permanent closing of Kroger's Roanoke bakery, that the Company would open a "drastically reduced 'skeleton' " terminal in the vicinity of Lynchburg, and that employees who were interested in working there should sign at the bottom of the notice. J.A. 931-32. Boone made no overture to negotiate over either the decision or the effects of the relocation. Guynn asked Boone how many employees he proposed to transfer to Lynchburg. Boone replied, "Five or six." Boone also indicated that he would offer transfers to Charlotte for four drivers and the rest of the drivers would be terminated. He told Guynn that he had not as yet found a new location in the Lynchburg area but claimed that the closing of the bakery required him to move. J.A. 932. Boone also made it plain that the Company planned to relocate the terminal regardless of anything that the Union might do and indicated that the move would take place in about sixty days. *Id.*

The Company also took unilateral action with respect to changes in its dispatch procedure. Until mid-June, the Company had long followed the practice at the Montvale terminal of posting and allowing drivers to bid on runs, every six months or so, in order of their seniority. The result of this procedure was that most of the drivers had regular runs each week, with the drivers with the most seniority getting their choice of the runs. However, on June 17, without consulting the Union, the Company posted a notice (signed by Terminal Manager McGalliard) that established a new procedure for dispatching drivers. The

effect of this new procedure was to abolish the sets of regular weekly runs and to place most runs on an individual rotation basis to be assigned without regard to seniority. J.A. 933-34. When Boone presented a copy of this new procedure to Union representatives at a meeting on June 18, he said it was designed to provide equal earnings for all remaining drivers since the driver making the lowest earnings in any given week would be the first to be assigned a run the following week. J.A. 934. The Union was given no opportunity to bargain over the changes in the dispatch procedure.

The Union noted during this June 18 meeting that the Company was now using twelve drivers to operate thirty-three regular runs, plus warehouse runs, and argued that there were more runs currently available at Montvale than there were drivers. The Company made no immediate response to this contention; but, on July 6, the Company recalled two drivers from layoff. J.A. 934. Additionally, shortly before a meeting on July 1, Boone wrote letters to several laid-off drivers, offering them work based out of the Charlotte terminal. Two turned down the offer outright and one ended up with an assignment to the Company's relocated Madison Heights terminal after much discussion with the Terminal Manager. J.A. 934 & n.8.

By telegram on June 27, and again at the July 1 meeting, Guynn protested Boone's instructions to certain drivers to report to Charlotte by June 30, claiming that this was insufficient notice and violated an understanding that Boone had reached with the Union. Boone told Guynn that it was not his intention to require Montvale drivers to relocate to Charlotte so abruptly since the Montvale terminal would be operating for another sixty days. Guynn said that he would never agree to the relocation of Montvale drivers to Charlotte, while the Company was sending Charlotte drivers to Roanoke to perform work that had previously been done by Montvale drivers.

He gave Boone a list of the runs in question to support the argument that the Montvale terminal could not operate with only five or six drivers. Boone did not respond to this charge, saying only that he would put up a notice asking drivers if they were interested in transfers to Charlotte or elsewhere within sixty days and stated that the Company would proceed with this change regardless of any Union objections. J.A. 934-35. The parties met again on July 15, but Boone said that he "had no proposals to make because his secretary was on vacation and so he did not have an opportunity to put . . . an offer together." J.A. 936.

The Company listed the Montvale terminal with a real estate broker in early July, but there is no indication in the record that the terminal was ever sold. *Id.* The Company did not obtain alternative premises in the Lynchburg area until late July, when it leased part of a shopping center in Madison Heights. On July 24, the Company posted a notice at its Montvale terminal, which stated that the operation was moving to Madison Heights, that there were jobs there for six drivers, that there were jobs for four drivers at Charlotte to handle the Montvale milk runs, and that all other employees were permanently laid off. *Id.*

On August 3, the Union conducted a strike vote. The employees who attended voted unanimously to strike, but the beginning of the strike was postponed about two weeks. *Id.* After a two-day strike that commenced on August 17, Union Secretary-Treasurer Guynn wrote Montvale Terminal Manager McGalliard a letter requesting "immediate and unconditional reistatement" for all the strikers. On the same day Boone replied to Guynn in writing, stating that Madison Heights would employ only the three most senior laid-off employees, on condition that there would be no future work stoppages without proper notification; that its Charlotte facility still needed some drivers; and that all other personnel were "placed in permanent layoff." J.A. 936-37.

On August 21, Boone sent permanent layoff notices to seven Montvale drivers "due to the reduction in business and the ensuing realign[ment]," effective August 22. The Company accelerated the planned opening of the Madison Heights operation to August 24 in response to the August 17-19 strike at Montvale. Its personnel roster at Madison Heights, as of October 1, included eight drivers and one utility man, all operating under the immediate supervision of former Montvale Assistant Manager Dickenson. Terminal Manager McGalliard was transferred back to Charlotte as a dispatcher. Notwithstanding Boone's assertion that offers of transfers to that location would be made in order of seniority, only two of the drivers who participated in the August strike at a Montvale were transferred to Madison Heights. Three senior drivers who participated in the strike were given permanent layoff notices, while employees who worked during the strike and were junior to these three were transferred, either at the same or promoted positions. J.A. 937-38.

After the Montvale terminal closed, the Company helped prepare and circulate a petition amongst the Madison Heights drivers seeking the ouster of the Union. The petition was initiated by a driver, but Dickenson, in his new role as Terminal Manager, had the petition typed up, kept it in his office at the Madison Heights terminal, and solicited signatures from employees as they returned from their respective runs. J.A. 938-39.

B. *The Board's Legal Conclusions*

Based on the foregoing facts, the Board unanimously found that the Company violated section 8(a)(1) of the NLRA[1] by threatening to transfer or discontinue work in reprisal for the employees' union activities; by threat-

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[1] Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" their rights under the Act.

ening to close a facility if the employees selected Local 171 as their collective-bargaining representative; by threatening to discharge employees for engaging in union activities; by threatening to refuse to bargain in good faith with Local 171; by interrogating employees about their union activities; by conditioning the reinstatement of striking employees upon the waiver of their section 7, 29 U.S.C. § 157 (1982), rights; and by assisting in the preparation and circulation of an antiunion petition. The Board also unanimously found that the Company violated sections 8(a)(5) and 8(a)(1) of the Act[2] by refusing to bargain over the effects of the layoffs of employees in May and June; by refusing to bargain over the discharge of employees in August; and by unilaterally changing the Company's dispatch procedure. Further, the Board unanimously found that the Company violated sections 8(a)(3) and 8(a)(1) of the Act[3] by unlawfully discharging employees in August and closing its Montvale terminal and relocating its work to Madison Heights. J.A. 993-99, 1002.

The Board also found, over one dissent, that the Company violated sections 8(a)(3) and 8(a)(1) of the Act by laying off employees in May and June, and violated sections 8(a)(5) and 8(a)(1) of the Act by failing to to bargain over these layoff decisions. The Board further found, with one abstention, that the Company violated sections 8(a)(5) and 8(a)(1) of the Act by failing to bargain over its decision to relocate.[4] Finally, the Board

[2] Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."

[3] Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[4] Because NLRB Chairman Dotson agreed that the relocation decision was unlawfully motivated, he found it unneces-

unanimously reversed the ALJ's finding that the Company violated sections 8(a)(5) and 8(a)(1) of the Act by instituting a wage increase in September. J.A. 999-1000, 1002.

The Board's Order required the Company to cease and desist from the specified unfair labor practices and from any other means or any other manner of interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by section 7 of the Act. Affirmatively, the Order required the Company to bargain with the Union; to offer full and immediate reinstatement to the discriminatees and to make them whole for any losses they might have suffered by reason of the discrimination; to reestablish the business operations at Montvale and restore the work formerly performed there by terminated unit employees; and to post an appropriate notice. The Board, contrary to the ALJ, found it unnecessary to order the inclusion of a visitatorial provision. J.A. 951-53, 1000-01, 1005-06.

II. Analysis

Under the Act, we must not disturb the Board's findings of fact when those findings are supported by substantial evidence based on the record considered as a whole. *See* 29 U.S.C. § 160(e) (1982); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Gateway Theatre Corp.*, 818 F.2d 971, 974 (D.C. Cir. 1987); *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1007 (D.C. Cir. 1981). In the instant case, we find that all of the Board's findings of fact (especially those relating to credibility), and most of the Board's legal findings, are clearly supported by substantial evidence based on the record considered as a whole. Thus, we affirm the

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sary to pass on the conclusion that the Company violated section 8(a)(5) of the Act by its failure to bargain over the decision to relocate the Montvale terminal. J.A. 1002 n.1.

Board's judgment and remedies except as outlined below.

A. *Findings of Unfair Labor Practices*

1. *The Section 8(a)(1) Violations*

Section 7 of the NLRA, 29 U.S.C. § 157 (1982), guarantees employees "the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . . ." Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1982), implements this guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

An employer may not interfere with employee organizational activities by threatening to close his plant. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965). In particular, an employer violates section 8(a)(1) of the Act by threatening to close a facility if the employees select the Union as their collective bargaining representative, *Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C. Cir. 1987); by threatening to discharge employees for engaging in union activities, *id.*; by threatening to refuse to bargain in good faith with a duly certified union, *id.*; by interrogating employees about their union activities, *Midwest Regional Joint Bd. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 740 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); by conditioning the reinstatement of strikers upon the waiver of their section 7 rights, *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 361-63 (7th Cir. 1979); and by assisting in the preparation and circulation of an antiunion petition, *NLRB v. Birmingham Publishing Co.*, 262 F.2d 2, 7-8 (5th Cir. 1959).

There is no doubt that substantial evidence supports the NLRB findings here that Terminal Manager McGalliard and Assistant Terminal Manager Dickenson engaged in conduct designed to coerce employees into repudiating the Union. As outlined above, drivers testified about the managers' repeated warnings before the election that, if the Union came in, the terminal would be closed. Management statements also indicated that work would be discontinued or transferred, or employees discharged, as a result of unionization.

In addition to these threats, substantial evidence supports the Board's findings that McGalliard interrogated a driver about his union activities, J.A. 928; that the reinstatement of striking workers was conditioned on waiver of their section 7 rights (*i.e.*, requiring the Union to give previous warning before striking), J.A. 937, 948-49; and that the Company assisted and promoted circulation of the antiunion petition at the Madison Heights terminal, and attempted to coerce drivers into signing it, J.A. 938-39.

The Company asserts two defenses to these findings. First, it challenges the ALJ's findings of credibility; and second, it contends that the statements did not violate the Act because they were only isolated statements made by minor supervisory employees that did not affect the employees' choice of a collective-bargaining representative. Brief for Appellant at 45-46. We reject both of these claimed defenses.

First, under the law of this circuit, it is clear that Board-approved credibility determinations of an ALJ are entitled to be upheld unless they are "hopelessly incredible" or "self-contradictory." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1368 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984). Because we find the ALJ's credibility determinations to be well within reasonable boundaries, we uphold them.

Second, we reject the contention that the statements attributed to the Montvale Terminal Manager and Assistant Terminal Manager should be ignored because these men can only be viewed as "minor supervisory employees." McGalliard and Dickenson were the only Company representatives with whom Montvale employees had regular and sustained contact. It was McGalliard's signature that appeared on the bottom of the June 17 notice to all drivers changing the Company's dispatch procedure. It was McGalliard who offered drivers work in Charlotte in early July. And, it was Dickenson who was appointed Terminal Manager at the newly opened Madison Heights facility after the Montvale terminal was closed. J.A. 937-38. This evidence does not support a claim that the men were merely "minor" supervisors.

Moreover, in response to the same assertion that statements uttered by line level supervisors should not be found violative of the Act, this court stated in *International Brotherhood of Teamsters v. NLRB*, 435 F.2d 416, 417 (D.C. Cir. 1970):

> A rough and ready point made by a supervisor in overalls, the kind of supervisor who is really more naturally engaged in conversation with the workers, may be far more credible and influential so far as the ordinary worker is concerned than a necessarily more formal, structured and purposeful statement of a high-ranking executive.

Finally, to the extent that the Company suggests that evidence of actual intimidation is necessary to establish a violation of section 8(a)(1), it is simply wrong. *See Southwest Regional Joint Bd. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970) (finding that the "proper question 'is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of employee rights under the Act'" (quoting *Joy Silk Mills, supra*, 185 F.2d at 743-44)).

2. *The Section 8(a)(5) and 8(a)(1) Violations*

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1982), requires that an employer recognize and bargain with a representative chosen by a majority of its employees. Once a bargaining relationship has been established, section 8(a)(5), read in conjunction with section 8(d), 29 U.S.C. § 158(d) (1982), imposes an obligation on both parties to bargain in good faith with a sincere desire to reach agreement. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). The unilateral implementation of a decision to lay off or discharge employees, or otherwise to change an established term or condition of employment, violates section 8(a)(5) of the Act. *See NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977) ("It is settled law that an employer may not unilaterally change its employees' wages or other working conditions when it is subject to the statutory duty to bargain with a designated representative of its employees.").

In the case before us, the NLRB unanimously found that Boone violated sections 8(a)(5) and 8(a)(1) by unilaterally changing its driver dispatch procedure; by refusing to bargain over the effects of the layoffs of employees in May and June; and by refusing to bargain over the discharges of employees in August. We find that these determinations are supported by substantial evidence on the record as a whole.

First, the record shows that, in June 1986, the Company unilaterally changed its longstanding dispatch procedure. J.A. 933-34, 947-48. On June 17, without consulting the Union, the Company notified employees that a new dispatch procedure would be implemented beginning June 22. It did not mention this new procedure to the Union until the following day. The ALJ found, J.A. 948, and the Company does not dispute, that the dis-

patch procedure was a "condition of employment." *See* section 9(a) of the Act, 29 U.S.C. § 159(a) (1982). Under section 8(a)(5), it is unlawful to change a "condition of employment" without notifying the Union of the proposed change, offering to bargain, and bargaining with the Union in good faith concerning the change. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (examining what amounts to a "condition of employment"). It is clear that the Company did not fulfill its bargaining obligation to the Union regarding the change in the dispatch procedure, because it did not present the change to the Union as a proposal, but as a *fait accompli*. The record evidence similarly supports the Board's finding that the Company failed to give the Union an opportunity to bargain over the effects of the layoffs of two employees in May, the effects of the layoffs of five employees in June, and the discharge of seven employees in August. The record shows that the Company acted each time either without notifying the Union at all, or only notifying the Union as it took the action.

We offer no view as to whether the Company failed to meet its duty to bargain with the Union when it unilaterally decided to relocate its Montvale terminal. Because, as we explain below, we find that the relocation was discriminatorily motivated and therefore was an unlawful act in violation of section 8(a)(3), we find it unnecessary to decide whether the failure to bargain over the *decision* amounted to a violation of section 8(a)(5) as well.[5] In particular, we withhold judgment on any issues potentially raised by the facts at hand with respect to the suggestion in *First Nat'l Maintenance*, *supra*, that an employer has no duty to bargain over a *decision* to close part of its business when that decision is moti-

[5] To the extent that the Board's opinion can be read to suggest that an 8(a)(5) violation *must* follow from an 8(a)(3) violation, a judgment on this issue is unnecessary to our decision and thus we make no findings on it.

vated by legitimate economic concerns. *See also Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 225-27 (4th Cir. 1988).

3. *The 8(a)(3) and 8(a)(1) Violations*

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1982) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization . . . ." Accordingly, an employer violates section 8(a)(3) of the Act when, in retaliation for employees' union activities, it lays off or discharges employees, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983); *Southwire*, 820 F.2d at 459-63, or closes a facility, *Carrier Corp. v. NLRB*, 768 F.2d 778, 783 (6th Cir. 1985).

The critical question to be determined is "whether the employer's actions are motivated by anti-union considerations." *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir. 1982). Motive is a question of fact, *Southwire*, 820 F.2d at 459, and the Board may rely on both circumstantial and direct evidence in determining an employer's motive, *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597 (1941). In inferring that adverse action was taken because of employees' union activities, the Board may consider such factors as the employer's knowledge of the employees' union activities, *NLRB v. Proler Int'l Corp.*, 635 F.2d 351, 356 (5th Cir. 1981), the employer's hostility towards the union, *NLRB v. Florida Tile Co.*, 557 F.2d 576, 577 (6th Cir. 1977), and the timing of the employer's action, *NLRB v. Electric City Dyeing Co.*, 178 F.2d 980, 983 (3d Cir. 1950).

In the instant case, the NLRB found that the Company violated sections 8(a)(3) and 8(a)(1) by laying off and discharging employees at its Montvale terminal and by

closing the terminal at Montvale and opening a replacement terminal in Madison Heights as a reprisal against the employees for engaging in union activities. J.A. 995-97. It based this decision on the Company's "numerous preelection statements threatening the employees with the closing of the Montvale terminal and a loss of jobs if the Union won," J.A. 995, the same section 8(a)(1) violations we have delineated and affirmed above. The Company asserts, however, that the Board holding should be rejected because of the legitimate economic reasons it had for taking the action it did. The Company points to the reassignment of the dairy runs in April, the termination of the Kroger flower runs in May, and the closing of the Roanoke bakery in June as legitimate economic motives for the layoffs and the closing of the terminal.

In reviewing the Board's rejection of the Company's contention that its actions were economically rather than discriminatorily motivated, we apply the *Wright Line* test used in cases of mixed motive. This test was enunciated in *NLRB v. Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and later upheld by the Supreme Court in *Transportation Management Corp., supra*. As we have noted:

> The approach the Board adopted in *Wright Line* . . . requires the General Counsel to "make a *prima facie* showing sufficient to support the inference that [the employee's participation in] the protected conduct was a 'motivating factor' in the employer's decision." . . . Once the General Counsel establishes a *prima facie* showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Passaic Daily News v. NLRB, 736 F.2d 1543, 1552-53 (D.C. Cir. 1984) (citation omitted) (quoting *Wright Line*, 251 N.L.R.B. at 1089) (language in brackets added

by the court); *see also Gateway Theatre Corp.*, 818 F.2d at 974-75 & n.6.

The Company's early open hostility toward Union activity, and its 8(a)(1) violations, are clearly sufficient to establish a *prima facie* case that antiunion considerations were a motivating factor in its decisions. Thus, under the *Wright Line* test, once the General Counsel made this showing, the burden shifted to the Company to prove that it would have taken the same actions even in the absence of the protected conduct. We uphold the Board's findings that neither the June layoffs nor the ultimate closing of Montvale pass the *Wright Line* test and that, therefore, the Company's actions violate section 8(a)(3) as well as 8(a)(1). However, we reverse the finding that the May layoffs of employees violated section 8(a)(3), because it is not supported by substantial evidence.

There is substantial evidence to support the Board's conclusion that the Company "failed to demonstrate a legitimate [business] reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights, when it was able to continue to operate its Montvale terminal with enough work for 15 drivers [for two months] after the Roanoke bakery closing." J.A. 998. The Board notes:

> The fact that the Madison Heights terminal is 37 miles closer to Lynchburg than the Montvale facility had been does not establish an economic motivation for the Respondent to close its Montvale facility and reopen a new terminal with only half the work force. It did not suffer a 50-percent reduction in work when the Roanoke bakery closed. One of the . . . Respondent's witnesses testified that the actual reduction was approximately 4400 miles per week out of a total of about 33,700 miles per week, or about one-seventh of the overall mileage. The clear alternative explanation for the move is that the Respondent wished to rid itself of the Union at the Montvale lo-

> cation by opening a significantly smaller facility elsewhere, when it employed only two of the employees who had participated in the strike. This conclusion is further supported by the Respondent's action, less than a month after the move, in circulating a petition among the employees disavowing support for or interest in the Union. Accordingly, we conclude the judge was correct in his finding of an 8(a)(3) violation.

J.A. 998-99. In view of the context of explicit Company threats to close the Montvale facility in the event of the Union's being certified, and of simultaneous discriminatory layoffs, we believe the Board was entitled to find that the Company failed to establish a *Wright Line* defense for the relocation.

There is also sufficient evidence to conclude that the June layoffs would not have occurred without illegal anti-union animus. These layoffs amounted to a twenty-four percent reduction in workforce in response to only a fourteen percent reduction in its work. J.A. 996. In fact, the Company was forced to recall two of the drivers only three weeks after it made these cuts, evidently because it had too much work to handle without them, further reinforcing the implication that the June cuts were merely another step in the Company's plan to carry out its preelection threats. *Id.* Nor do the Company's economic records evidence anything but that its asserted economic defense is a mere pretext in this context.[6]

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[6] Indeed, the June layoffs in response to the closing of the Roanoke bakery represented a deviation from past Company practice. The Board referred to the ALJ's finding that the layoffs "occurred without any effort on the part of the [Company] to see if it could obtain additional work as it had in the past." J.A. 996. In his discussion of the June layoffs, the ALJ added that:

> [The Company's] long-term commercial strategy at Montvale was an understandable effort to avoid placing all of

However, the Board gives no reasonable explanation for its finding of a violation in connection with the May layoffs. The record indicates substantial business concerns sufficient to prompt the layoff of two employees in early May. The record also reveals that the employees laid off were the two most junior drivers and that they were responsible for the flower runs terminated by Kroger. J.A. 156, 929. Furthermore, the combination of the loss of the flower runs and the transfer of the Savannah milk runs was not offset entirely by the increase in the Roanoke bakery mileage. We find that the Board's reasoning that the transfer of the milk runs, "although not alleged as an 8(a)(3) violation, must be viewed in the context of [the Company's 8(a)(1) violations]," J.A. 995, to be a distortion of the *Wright Line* doctrine. While it is true that the Company was guilty of "flagrant and continuing" unfair labor practices, J.A. 951, this does not allow the Board to label the May layoffs as discriminatory without conducting any rational inquiry into the Company's business judgments with respect to these particular layoffs. The record clearly supports a finding that the Company would have laid off two employees in May without regard to antiunion considerations. We therefore reverse the finding that the May layoffs violated section 8(a)(3).

B. *Remedies*

It has long been recognized that in fashioning remedies under the provisions of section 10(c) of the Act, 29 U.S.C. § 160(c), "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy

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its eggs in one basket by relying too heavily upon any one customer or any single source of business to support the terminal. Customers came and went, and there is no record evidence that the [Company] engaged in earlier layoffs when this happened at Montvale.

J.A. 943.

must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *accord United Food & Commercial Workers Int'l Union v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988). The Board's remedial order must therefore be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *United Steelworkers of America v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

However, the Board's broad discretion does not give it license to act arbitrarily. Not only must its decision be supported by substantial evidence, *United Food & Commercial Workers Int'l Union, Local 152 v. NLRB*, 768 F.2d 1463, 1469 (D.C. Cir. 1985), it must also be in accordance with announced policies and procedures, *Hall-Brooke Hospital v. NLRB*, 645 F.2d 158, 160 (2d Cir. 1981); *United Food & Commercial Workers*, 852 F.2d at 1347. Under this standard we uphold the Board's remedial order as far as it goes, but remand for reconsideration of the Union's request for a visitatorial (information gathering) clause.

1. *Reinstatement, Backpay and Resumption of Operations*

Having found that the Company discriminatorily closed the Montvale terminal and laid off and discharged many of its employees, the Board determined that the policies of the Act would best be effectuated by ordering the Company to resume the operations at the Montvale terminal and reinstate with backpay its laid-off and discharged employees. J.A. 950. This remedy must be upheld unless the employer can show undue hardship. *See, e.g., Statler Indus. v. NLRB*, 644 F.2d 902, 909-10 (1st Cir. 1981). Indeed, in recognizing that the usual cease-and-desist order and backpay remedies are insufficient to

deal with a violation involving a discriminatory closing of a company facility, courts of appeals have upheld restoration orders absent significant mitigating circumstances. *See, e.g., NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 205 (10th Cir. 1982); *Statler*, 644 F.2d at 909-10. Because the Company presented no evidence of undue hardship, the Board clearly acted within its discretion in ordering the reopening of the Montvale terminal.

In order to overturn the Board's restoration order, the Company must show that compliance with the order is unduly economically burdensome. *See, e.g., Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 68 (3d Cir. 1978) (reopening of uneconomic plant would cost one million dollars plus operating loss of several hundred thousand dollars a year). The Company here has not demonstrated that the Board's order would require a substantial outlay of new capital or otherwise cause undue financial hardship. Nor has it established, as it must to have the Board's restoration order overturned, that the order "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (citation omitted). Thus, we affirm the Board's remedial order as far as it goes.

2. *The Visitatorial Clause*

The Union contends that the Board abused its discretion in rejecting, in the absence of exceptions, the ALJ's recommended inclusion of a visitatorial (information gathering) clause in the remedial order.[7] The reasons for the ALJ's recommendation were "the flagrant and

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[7] A visitatorial clause permits the Board to examine the books and records of a violator of the Act and to take statements from its officers and employees and others for the purpose of determining or securing compliance with a court's judgment.

continuing nature of the [Company's] conduct." J.A. 951.[8]

Given that the Board adopted the ALJ's finding that the Company engaged in pervasive violations of the Act, it is not at all clear why the Board simultaneously refused to include a visitatorial clause. The Board merely stated that "such provision is unnecessary," J.A. 994 n.5, without further explanation. We remand for reconsideration in light of the Board's recent decision in *Cherokee Marine Terminal*, 287 N.L.R.B. No. 53 (Jan. 28, 1988).

Cherokee Marine Terminal explained the Board's reluctance to include visitatorial provisions on a routine basis. Nevertheless, the Board reaffirmed that it would allow such a remedy in appropriate circumstances, such as "when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance." Slip op. at 10. In the instant case, the Board adopted the ALJ's finding that "the violations of the Act found herein evidence an attitude on the part of [the Company] to behave in total disregard for the rights of its employees and the obligations imposed upon it by Congress." J.A. 950. We do not see that this conclusion is consistent with an unexplained rejection of the inclusion of the visitatorial clause.

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[8] The recommended visitatorial provision provided:

> For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the [Company], its officers, agents, successors, or assigns, or and other peron having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

J.A. 953.

We offer no opinion regarding the necessity of a visitatorial clause as a part of the Board's remedial order. This is a matter for the Board to assess in the first instance. Accordingly, we remand to allow the Board to reconsider this matter and to explain its judgment in light of *Cherokee Marine Terminal*.

III. Conclusion

In sum, because we find that most of the NLRB judgments are supported by substantial evidence, we grant in significant part the Board's cross-application for enforcement. We reverse only the finding that the May layoffs of employees violated section 8(a)(3) of the Act, and we remand for reconsideration of the Union's request for a visitatorial clause. We find it unnecessary to decide whether the Company violated section 8(a)(5) when it failed to bargain over the decision to relocate part of its business.

So ordered.

285 NLRB No. 133

D--4736
Montvale, VA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE A.G. BOONE COMPANY

and

Cases 5--CA--18060
5--CA--18186
5--CA--18374

TEAMSTERS LOCAL UNION NO. 171, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On 31 December 1986 [1] Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] All dates are in 1986 unless otherwise indicated.

The Board has considered the decision and the record in light of the exceptions and briefs [2] and has decided to affirm the judge's rulings, findings,[3] and conclusions,

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[2] The Respondent has requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

to modify the remedy,[4] and to adopt the recommended Order as modified.[5]

1. The Respondent is a contract carrier in the southeastern United States specializing in the transportation of groceries and related items. At the

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[4] In accordance with our decision in New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with Florida Steel Corp., 231 NLRB 651 (1977).

[5] In his decision, the judge granted the General Counsel's request for a visitatorial provision, and included such a provision in the recommended Order. We conclude that such a provision is unnecessary, and we shall modify the recommended Order accordingly. In addition, par. 2(a) of the recommended Order and the corresponding paragraph in the notice appear as amended by the judge's grant of the General Counsel's 9 January 1987 motion to include the name of Carl R. Sparks therein.

time of the events at issue, the Respondent operated three terminals, one in Charlotte, North Carolina, one in Anderson, South Carolina, and one in Montvale, Virginia. On 3 May the Respondent laid off the two most junior drivers at its Montvale facility, Roger Mullins and Jerry Lee Holland. The Respondent asserted that because of the transfer of the Kroger flower runs and Savannah milk runs from the Montvale terminal to the Respondent's Anderson and Charlotte terminals, respectively, there was an insufficient amount of work at Montvale for these two drivers. The judge found that these layoffs took place against a background of intense union animus, and that they occurred just 3 weeks after the Union won a representation election on 13 April at Montvale. He further found that the discontinuance of the flower runs in mid-April left the Respondent with the same amount of revenue and the same

number of drivers at Montvale as it had in February, before the flower runs began. The judge also concluded that other Montvale business, notably that of the Kroger Westover dairy in Lynchburg, brought in slightly more revenue in May than it did in February, notwithstanding the transfer of the 2700 Savannah milk-run miles from Montvale to Charlotte in mid-April. Based on these findings, he concluded that the Respondent's asserted reason for the 3 May layoffs were pretextual and were unlawful.

The Respondent excepts to these findings on two grounds. First, it argues that mileage, not revenue, is the proper measure for what work was available for drivers and whether it was justified in laying off Mullins and Holland. In addition, the Respondent maintains that the exhibit on which the judge relied as an indication of Montvale's revenue from the Lynchburg dairy actually reflects revenue received by the

Charlotte facility from the Savannah milk runs as well. The Respondent further argues that its Exhibit 7, showing the gross revenue received from Kroger by Montvale-Madison Heights drivers indicates that there was a decline in revenue from March through August.

In assessing the Respondent's argument that the 3 May layoffs were economically motivated, we agree with the judge that the flower runs which Montvale handled for a 6-week period in March and early April are not significant, in that Montvale had the same amount of work and the same number of drivers both before and after the flower runs were assigned there. With respect to the transfer of the Savannah milk runs, the mileage hauled by Montvale from the Lynchburg dairy did decline from April to May and this loss of miles was not entirely offset by an increase in the Roanoke bakery mileage. However, the transfer of these

runs from Montvale to Charlotte, although not alleged as an 8(a)(3) violation, must be viewed in the context of the Respondent's numerous preelection statements threatening the employees with the closing of the Montvale terminal and a loss of jobs if the Union won. In addition, the Respondent's own Exhibits 7 and 8, although showing a decrease in revenue from March through May, also show an increase in net profit for the same period of time. Thus, in light of the Respondent's preelection threats, the timing of the transfer of the Savannah milk runs and the layoffs of the employees, and the fact that net profit increased during this time period, we agree with the judge that the 3 May layoffs of Mullins and Holland were discriminatorily motivated and violated Section 8(a)(3) of the Act.

2. On 13 June Kroger announced its decision to close its Roanoke bakery which accounted for approximately one-seventh of

Montvale's total business, measured in mileage. On 14 June the Respondent laid off four drivers in order of seniority and one utility man, on 17 June it informed the remaining employees that it was going to close its Montvale facility. The Respondent indicated that about five or six employees would be offered transfers to a new location near Lynchburg, about four would be offered transfers to Charlotte, nd the rest of the employees would be laid off. Three weeks later, the Respondent recalled two of the drivers, evidently because it had made too drastic a cut from its work force on 14 June.

The judge found that these layoffs on 14 June were a further step in the Respondent's plan to fulfill its preelection threats and close the Montvale terminal. Specifically, the judge noted that the Respondent had resorted to "overkill" when it laid off more drivers than it could afford to do without

(approximately 24 percent of its work force in response to an approximately 14-percent reduction in its work). The judge further noted the immediacy of the announced layoffs and closing, which occurred without any effort on the part of the Respondent to see if it could obtain additional work as it had in the past. In addition, the judge noted that the Montvale milk runs in late August brought in some $13,000 more revenue than they did in May, thus displacing any loss of business occasioned by the loss of bakery work. He then concluded that the Respondent's asserted economic defense was a pretext, and determined that the 14 June layoff violated Section 8(a)(3) and (1).

The Respondent excepts to the judge's finding of a violation for the June layoffs, arguing that the Roanoke bakery closing was an independent action which represented a significant loss of business for the Montvale terminal. The Respondent further

contends that the judge again erroneously interpreted documents as representing the Montvale portion of the Lynchburg dairy runs when they actually show the total revenues from those runs, including that portion attributable to the Charlotte facility.

We agree with the judge that the layoffs represented a further attempt by the Respondent to fulfill its preelection threats and to close the Montvale facility. Although the Respondent correctly states that the judge erroneously interpreted certain documents with respect to revenues and urges us to rely on its Exhibit 7, which indicates a significant loss of revenue at Montvale from May to June, we note that there is only a slight loss of net profit during this time. Thus, we find that the economic data provided by the Respondent is not sufficient to overcome the strong prima facie case established by the General Counsel by the preelection threats and the

developing pattern of the fulfillment of those threats.

3. On 17 August the Montvale employees engaged in a strike. On 19 August they abandoned the strike and requested immediate reinstatement. On 24 August the Respondent closed its Montvale facility and began operating a scaled-down facility with only eight drivers in-Madison Heights, a suburb of Lynchburg.

The judge found that this relocation of work was discriminatorily motivated and was the culmination of the Respondent's established pattern to fulfill its preelection threats. The judge apparently relied in part on the"fact that "M&M" milk runs out of Lynchburg, which the Respondent acquired in early August, were immediately assigned to its Charlotte facility rather than to Montvale, despite the fact that Montvale had handled all the Lynchburg runs up to that time, with the exception of the

Savannah runs transferred in April to Charlotte. In addition, the judge noted that the Respondent misrepresented part of its motivation for the move by claiming that Kroger had wanted it to move to a location closer to Kroger's Lynchburg dairy. Kroger's traffic analyst, called as a witness by the Respondent, testified that Kroger made no such request for a terminal relocation.

The Respondent excepts to this finding, maintaining that the closing of the Montvale terminal was an economic decision motivated solely by the closing of the Roanoke bakery. We find no merit in this defense. After the Roanoke bakery closed on 13 June, the Respondent continued to operate its facility at Montvale with 15 drivers, and continued to have enough work for all of them. In fact, two of the four drivers laid off on 14 June were recalled to work on 6 July. The total mileage hauled from Montvale did

not significantly decrease from mid-June through August. Thus, unlike the judge, we find it unnecessary to rely on the assignment of the M&M runs to the Charlotte terminal instead of the Montvale facility as evidence of unlawful motivation, because the decision to relocate the Montvale terminal was made in June, prior to the acquisition of the M&M runs. Rather, we rely on the fact that the Respondent has failed to demonstrate a legitimate reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights, when it was able to continue to operate its Montvale terminal with enough work for 15 drivers after the Roanoke bakery closing. The fact that the Madison Heights terminal is 37 miles closer to Lynchburg than the Montvale facility had been, does not establish an economic motivation for the Respondent to close its Montvale facility and reopen a new terminal with only half the

work force. It did not suffer a 50-percent reduction in work when the Roanoke bakery closed. One of the Respondent's witnesses testified that the actual reduction was approximately 4400 miles per week out of a total of about 33,700 miles per week, or about one-seventh of the overall mileage. The clear alternative explanation for the move is that the Respondent wished to rid itself of the Union at the Montvale location by opening a significantly smaller facility elsewhere, when it employed only two of the employees who had participated in the strike. This conclusion is further supported by the Respondent's action, less than a month after the move, in circulating a petition among the employees disavowing support for or interest in the Union. Accordingly, we conclude the judge was correct in his finding of an 8(a)(3) violation.

4. In addition, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a wage increase on 28 September 1986. This violation was not alleged in the consolidated complaint prior to the hearing, apparently because neither the Charging Party nor the General Counsel was aware of it until it was raised in testimony.[6] Although the increase was mentioned by the Respondent's dispatcher, Thomas Dickenson, no mention was made at the hearing or thereafter to include it in the consolidated complaint. Despite its absence from the consolidated complaint, the judge found that the matter had been fully litigated, inasmuch as Dickenson admitted under oath the facts which constitute a violation. The Respondent excepts to this finding. We find merit in the Respondent's exception.

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[6] The hearing was held on 7 and 8 October 1986.

Contrary to the judge, we do not believe that the testimony in the record establishes a violation of the Act. Dickenson's testimony regarding the wage increase indicated that on 28 September 1986, the Respondent instituted a raise of one-half cent on the mile, 15 cents on the hour, and 25 cents on "dropping the hook" (returning an empty trailer and picking up a load). There is no mention of whether bargaining was requested or engaged in. Neither the counsel for the General Counsel nor the counsel for the Charging Party pursued this line of questioning. Although the judge states that the Respondent "made no pretense of notifying the Union or bargaining with it concerning these increases," we do not find that this conclusion is supported by record evidence. The evidence establishes only that the wage increase was granted, and is silent as to whether the Union was afforded an opportunity to bargain. Thus,

we cannot conclude that a violation occurred, and we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) by instituting a wage increase on 28 September 1986.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The A.G. Boone Company, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Unilaterally changing dispatch procedures, unilaterally laying off or discharging employees, and unilaterally closing its truck terminals and opening other terminals to replace them, without

first notifying the Union and bargaining collectively in good faith with it, on request, until an agreement or an impasse is reached."

2. Substitute the following for paragraph 2(a).

"(a) Offer full and immediate reinstatement to Jerry Lee Holland, Roger Mullins, Jerry Durham, Albert Conner, Randolph Custer, Malcolm Bonhotel, Carl R. Sparks, Ricky Mullins, Brian Noakes, Johnny Johnson, and Harold Lynch to their former or substantially equivalent employment, without prejudice to their seniority or other rights they may have previously enjoyed, and make them whole for any loss of pay or other benefits which they have suffered by reason of the discriminations found herein, in the manner described in the remedy section."

3. Substitute the following for paragraph 2(e).

"(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 24 September 1987

_____
Wilford W. Johansen, Member

_____
Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting in part.

I agree with my colleagues' adoption of the various 8(a)(1) violations found by the judge, his findings that the Respondent violated Section 8(a)(5) by its refusal to bargain over the effects of the May and June 1986 layoffs, and his findings that the Respondent violated Section 8(a)(3) by unlawfully closing the Montvale terminal and relocating to Madison Heights. I also join in their reversal of the judge's conclusion that the Respondent violated Section 8(a)(5) by implementing a wage increase in September 1986. I disagree, however, with their adoption of the judge's findings that the Respondent violated Section 8(a)(3) by laying off employees in May and June, and his finding of an 8(a)(5) violation for the

Respondent's failure to bargain over its decision to lay off those employees.[1]

As the majority recognizes, the economic date presented by the Respondent does not establish a decline in the Respondent's business at the Montvale terminal just prior to both the May and June layoffs. In April the Kroger Company requested that its flower runs be handled exclusively by the Anderson-based drivers. In addition, the Respondent transferred the Savannah milk runs from its Montvale facility to its Charlotte facility. The undisputed evidence indicated that this action was taken in order to combine the Savannah milk runs with the new "A&P" runs

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[1] Because I agree with the judge's finding that the relocation of the Montvale terminal was discriminatorily motivated, I find it unnecessary to pass on the judge's conclusion that the Respondent violated Sec. 8(a)(5) by its failure to bargain over the decision to relocate.

it acquired at that time and which were being handled out of its Charlotte facility. The A&P runs were hauled from Charlotte to Greensboro. After the load was dropped off in Greensboro, the Charlotte trucks would continue on to Lynchburg, pick up the Savannah milk load, and take that load to Savannah on their way back to Charlotte. According to the unrefuted testimony of Respondent's witness Bud Boone, this reassignment of work from Montvale to Charlotte saved the Respondent $200 a trip.

There is nothing in the record, other than the 8(a)(1) threats to close the Montvale facility, that would suggest that the Respondent's actions were anything but a valid exercise of its business judgment. Without more, I cannot join my colleagues in concluding that the mere fact that the threats were made necessarily establish an unlawful motive for the layoffs which followed this loss of business at Montvale,

particularly in light of the two independent factors which intervened: the request by Kroger concerning the flower runs and the acquisition of the new A&P runs. Once this business was transferred away from the Montvale terminal, the Respondent no longer had a sufficient amount of work to support the number of drivers it employed. The validity of this conclusion is supported by the fact that, after the May layoffs, the Respondent was able to successfully handle the amount of work at Montvale without transferring other work away or hiring additional drivers. Accordingly, I dissent from the majority's adoption of the judge's finding of an 8(a)(3) violation for the May layoffs.

On 13 June the Respondent was informed that the Roanoke bakery was closing. The following day, it laid off, by seniority, four of its Montvale drivers. Within 3

weeks, two of those drivers were recalled and continued to work until the Montvale facility closed in August. The judge found, and the majority agrees, that these layoffs were discriminatorily motivated. Again, I must disagree. The loss of some 4400 driver miles per week was caused, not by any action on the part of the Respondent, but by the independent decision of Kroger to close its Roanoke bakery. Although the judge and the majority find it significant that the Respondent immediately laid off four drivers and then later had to recall two of them, I find no evidence in the record that would lead me to conclude that the Respondent had acted in a manner inconsistent with the legitimate exercise of its business judgment. Accordingly, I would not find a violation for the June layoffs.

The judge also concluded, and the majority agrees, that the Respondent's failure to bargain about its decision to lay

off these employees in May and June violated Section 8(a)(5) of the Act. I disagree. Although it is well settled that an employer must bargain over the effects of its decision to lay off employees, I believe that the decision itself is one that has "as its focus only the economic profitability [of the action and thus is] wholly apart from the employment relationship." [2] In these circumstances, no bargaining obligation would be incurred, because "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[3] Accordingly, I dissent.

Dated, Washington, D.C. 24 September 1987

Donald L. Dotson, Chairman

NATIONAL LABOR RELATIONS BOARD

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[2] First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 (1981).

[3] Id. at 678--679 (footnote omitted).

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Teamsters Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the drivers, hostlers, and service utility employees employed at the

Montvale, Virginia plant and any relocations thereof.

WE WILL NOT unilaterally change dispatch procedures, and WE WILL NOT unilaterally lay off or discharge employees or close truck terminals and open other terminals to replace them without first notifying the Union and bargaining collectively in good faith with it, on request, until an agreement or impasse is reached.

WE WILL NOT discourage membership in, or activities on behalf of, Teamsters Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by transferring bargaining unit work from our Montvale, Virginia terminal, or any other terminal, to any other location, by laying off or discharging employees, by closing truck terminals and opening other

truck terminals to replace them, or otherwise discriminating against employees in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union or protected, concerted activities, or the union or protected, concerted activities of other employees.

WE WILL NOT threaten employees with loss of job opportunities, discharge, plant closure, or plant relocation in reprisal for engaging in union or protected, concerted activities.

WE WILL NOT threaten to discharge union adherents when their identities become known.

WE WILL NOT threaten to refrain from bargaining in good faith with the Union if it is selected as bargaining agent.

WE WILL NOT inform employees that bargaining unit work has been transferred to other

locations because employees had selected the Union as their bargaining agent.

WE WILL NOT threaten to drag out negotiations if the Union is selected as bargaining agent.

WE WILL NOT condition the recall of strikers on their agreement to refrain from striking without giving advance notice.

WE WILL NOT circulate among employees a petition aimed at undermining the status of the Union as bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with Teamsters Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective bargaining representa-

tive of the drivers, hostlers, and service utility employees employed at our Montvale, Virginia terminal, and any relocations thereof, and, if agreement is reached, embody that agreement in a signed, written contract.

WE WILL reestablish the business operations at the Montvale, Virginia terminal, and restore the work formerly performed there by terminated unit employees.

WE WILL offer full and immediate reinstatement to Jerry Lee Holland, Roger Mullins, Jerry Durham, Albert Conner, Randolph Custer, Malcolm Bonhotel, Carl R. Sparks, Ricky Mullins, Brian Noakes, Johnny Johnson, and Harold Lynch to their former or substantially equivalent employment, and WE WILL make them whole for any loss of pay or benefits which they may have suffered by

reason of the discriminations found in this case, plus interest.

THE A. G. BOONE COMPANY
(Employer)

By:_____

(Representative) (Title)

Dated:_____

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Candler Building, 4th Floor, 109 Market Place, Baltimore, Maryland 21202, Telephone 301--962--2772.

JD--323--86
Roanoke, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE A.G. BOONE COMPANY

and

Cases 5--CA--18060
5--CA--18186
5--CA--18374

TEAMSTERS LOCAL UNION NO. 171, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

James P. Lewis, Esq., and Albert W. Palewicz, Esq., of Baltimore, Maryland, for the General Counsel.
Jonathan G. Axelrod, Esq., of Washington, D.C., for the Charging Party.
Lloyd C. Caudle, Esq., of Charlotte, North Carolina, for the Respondent.

DECISION

I. Findings of Fact

A. Statement of the Case

WALTER H. MALONEY, JR., Administrative Law Judge. This case came on for hearing before the undersigned at Roanoke, Virginia,

upon a consolidated unfair labor practice complaint,[1] issued by the Director of the Board's Fifth Region and amended at trial,

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[1] The principal docket entries in this case are as follows:

Charge filed by Teamsters Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein called Union) against Respondent on May 5, 1986; First amended charge therein filed on June 9, 1986; Complaint issued by Director, Region 5, against Respondent in Case No. 5--CA--18060 on June 16, 1986; Respondent's Answer filed on June 27, 1986; Charge filed in Case No. 5--CA--18186 by Union against Respondent on June 30, 1986; First amended charge filed therein on August 14, 1986; Consolidated Complaint issued by Director, Region 5, in Cases Nos. 5--CA--18060 and 5--CA--18186 against Respondent on August 20, 1986; Respondent's Answer filed on August 28, 1986; Amendment to Consolidated Complaint filed on September 29, 1986; Charge filed against Respondent by Union in Case No. 5--CA--18374 on September 25, 1986; Amendment to Consolidated Complaint resulting from that charge made by the General Counsel at the hearing; Hearing held in Roanoke, Virginia, on October 7 and 8, 1986; Briefs filed herein by the General Counsel, the Charging Party, and the Respondent on or before November 12, 1986.

which alleges that Respondent A. G. Boone Company[2] violated Sections 8(a)(1), (3), and (5) of the Act. More particularly, the Consolidated Complaint, as amended, alleges that the Respondent repeatedly threatened to close the Montvale terminal if the drivers at that terminal became unionized, threatened to transfer work away from the Montvale terminal if it became unionized, threatened to drag out any negotiations

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[2] The Respondent admits, and I find, that it is a Delaware corporation, which operated an office and place of business at Montvale, Virginia, and now operates an office and place of business at Madison Heights, Virginia, where it has been, and is, engaged in the interstate and intrastate transportation of freight and commodities by motor truck. During the preceding twelve months, a representative period, Respondent has performed trucking services from its Virginia terminals in excess of $50,000 in states other than Virginia. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

which might follow a union victory at the April 13 representation election, refused to bargain with the Union concerning the closing of the Montvale terminal and the effect of closing upon unit employees, relocated its Montvale terminal to Madison Heights for discriminatory reasons, laid off employees without bargaining concerning the layoff, and unilaterally changed its dispatch procedures. Respondent denies all of these allegations and states that it relocated its Montvale terminal for business reasons. Upon these contentions the issues herein were joined.[3]

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[3] The General Counsel's Motion to Amend the Transcript is granted. In addition to the revisions contained in the General Counsel's Motion, the transcript herein is hereby amended as follows:

1. On page I-8, line 1, delete the word "not"
2. On page I-74, page 24, change "unfounded" to "unfunded"
3. On page I-75, line 15, change "service" to "surface"
4. On page I-86, line 24, change "instruct" to "struck"

B. The Unfair Labor Practices Alleged

For many years the Respondent has been a contract carrier in the southeastern United States specializing in the transport of groceries and related items. It is essentially a family business and is now owned and operated by A. G. "Bud" Boone. Its headquarters and principal terminal is at Charlotte, North Carolina. At issue in this case are events which took place at a branch terminal which it maintained at Montvale, Virginia, beginning in 1979 and which it relocated in August 1986, to Madison Heights, Virginia some 37 miles away. As a contract carrier, the Respondent hauls for a limited number of customers, including the Kroger food chain (and Kroger's subsidiaries), A & P, Winn-Dixie, White House Foods, and Chandler Foods. At one time it hauled for Keystone, a supplier of McDonald's Restaurants.

The 70 or so drivers and mechanics employed by the Respondent at its Charlotte "flagship" terminal have long been unionized. At one time or another, the Respondent has operated four other unionized terminals - Atlanta, Greenville, Raleigh, and High Point, North Carolina. Most of these terminals were unionized when they were acquired. All of them are now closed. In the past ten years, Respondent has opened two terminals, one at Anderson, South Carolina, and the terminal here in issue at Montvale, Virginia. Until the spring of 1986, both of these terminals were non-union. On April 13, the drivers and maintenance men at the Montvale terminal voted 16 to 6 to be represented by the Charging Party in this case (Case No. 5--RC--12610). The Charging Party was certified on April 28.

Respondent owns the premises which were occupied until recently by the Montvale terminal. They are located on U.S. Route 460, just east of Roanoke in the direction of Lynchburg. At the time of the election it employed about twenty drivers and three maintenance men at this terminal. Respondent opened this terminal in 1979, and soon thereafter transferred James R. "Red" McGalliard from Charlotte to act as terminal manager. It also transferred a few drivers from its other terminals but, for the most part, Respondent hired its employee complement locally. In 1979, Kroger opened a dairy at Lynchburg, operating it as a subsidiary under the name of Westover. It was the opening of the Kroger dairy which prompted the Respondent to open the Montvale terminal. At first Kroger's Lynchburg dairy was serviced by Respondent's drivers domiciled in Charlotte, but even-

tually many of the Kroger-Westover milk runs from Lynchburg came to be handled by Montvale drivers. Some of these runs were, and still are, handled by Kroger by utilizing its own fleet of trucks and its own drivers.

At the time Respondent opened the Montvale terminal it was hoping to obtain more work from Kroger. Eventually it got that work. Until June, 1986, Kroger operated a large bakery at Roanoke from which it supplied its retail outlets throughout the southeastern United States. It also maintains a warehouse at Salem, Virginia, a suburb of Roanoke. Montvale drivers began to haul bakery products from the Roanoke bakery to South Carolina and elsewhere, and hauled fruit juice and other items on back hauls to the Salem warehouse.

Two Montvale drivers testified credibly that, when they were hired, they were told

of the Respondent's unyielding intention to operate the Montvale terminal as a non-union facility. Assistant Terminal Manager and Dispatcher Thomas J. "Jack" Dickenson told driver Cecil Stultz in 1981 when Stultz was being hired that, if a union ever came into the Montvale terminal, it would be closed. Dickenson also told driver Malcolm Bonhotel the same thing when Bonhotel was hired in 1982.

Early in 1986, the Union began its organizing drive at Montvale. On February 20, Jim H. Guynn, the Union's Secretary-Treasurer, sent a letter to Boone at his Charlotte office demanding recognition. Boone replied on February 24. He declined to recognize the Union and insisted on an election. A representation petition was promptly filed and an election was held on April 13. The Union won 16 to 6.

At or about the same time that the election campaign was in progress, Kroger hired the Respondent to replace its previous contract carrier in making certain flower delivery runs emanating from the Kroger warehouse at Simpsonville, South Carolina. This contract amounted to about 20,000 miles of hauling per week. At the outset, about 2/3rds of the flower (or floral) runs were assigned to Respondent's drivers domiciled at its Anderson, South Carolina, terminal. This terminal is located some 30 miles from Simpsonville. About 1/3rd of the work, amounting to six runs per week and some extra runs just before holiday weekends, were assigned to Montvale drivers. The Montvale runs included deliveries directly to Kroger stores in Virginia and West Virginia from Kroger's Simpsonville facility.

Montvale drivers were scheduled to begin the flower runs on March 2. A week or so in anticipation of this event, McGalliard and drivers Richard L. Mullins and Jerry Durham, to whom these runs were going to be assigned, drove to the destinations in West Virginia to which flowers were scheduled to be delivered. They were driven to these locations by McGalliard in his private vehicle. While they were driving back to Roanoke, Durham asked McGalliard what he would do about the flower runs if the Montvale drivers voted the Union in. McGalliard replied, "You go ahead and do what you want, but if you vote it in, the flowers would be the first to go." McGalliard added that Boone had already told him that he was not going to give Local 171 "one red cent."

Sometime just before the election, drivers Johnny Johnson and Mike Mallow were

discussing the organizing drive with Dickenson. I credit Johnson's testimony that Dickenson told them to "try to talk the union down because if the union (was) voted in, Mr. Boone would lock the gate." At or about this same point in time, McGalliard told driver Shurwood Spicer that if the Union came in, they would close the terminal and he would go back to Charlotte. On another occasion just before the election, McGalliard was overheard by Holland, as the latter was returning to the terminal at the end of a run, telling another employee that, if the Union came in, the drivers would probably be out of a job. During the pre-election period, Dickenson told driver Cecil Stultz that the Company would close the terminal if the Union came in. On another occasion shortly thereafter, Dickenson told Stultz in the lobby of the terminal that five drivers "were in on this

union deal" and that there was a sixth, "and as soon as (I) find out who the sixth s.o.b. (is), (I) am going to fire the s.o.b."

On another occasion, just before the election, McGalliard followed Bonhotel to the latter's car as Bonhotel was getting ready to go home. McGalliard asked Bonhotel if he knew anything about the union business. Bonhotel replied that he could not tell McGalliard anything. McGalliard went on to say that Boone always "seemed fair to us and we seemed like we were treating you fellows fair", but added, "if the union comes in, I got the lock."

Flower runs from Simpsonville began on March 2, as scheduled. On some occasions, Montvale drivers would meet a truck from Simpsonville at a designated relay point, normally Princeton, West Virginia, and transfer a portion of the load into a second truck, thereby accommodating West Virginia

and Virginia deliveries without the necessity of sending two trucks all the way to South Carolina. This procedure ultimately did not meet with the approval of Kroger management in Cincinnati, notwithstanding the fact that it was slated to save an estimated $50,000 annually in hauling expenses. Kroger encountered late deliveries, sometimes occasioned by its own delays in loading the relay truck in South Carolina, as well as damage to merchandise in transit. Kroger told the Respondent that it would have to service the flower runs with Anderson-based drivers. On or about April 15, the Respondent began to haul flowers from Simpsonville exclusively with drivers domiciled at its Anderson, South Carolina, facility, although records in evidence indicate a small amount of flower deliveries being handled by Montvale drivers in late April. In anticipation of busy

holiday weekends, extra floral runs were made by Charlotte-based drivers as well as by extra driving assignments both at Anderson and at Montvale.

A few days after the election, driver Harold E. Lynch was on a flower run to Simpsonville from Montvale. During this run he called the Montvale terminal and spoke with Dickenson. Dickenson told Lynch during the course of this phone call that Montvale drivers would not be handling any more flower runs because the union had come in and they did not want any union drivers coming into Simpsonville. Lynch replied that this sounded like a big joke but Dickenson replied, "You can call it a joke if you want to, but I think it's pretty serious." At or about this same point in time, Dickenson told driver Johnny R. Johnson at the Montvale terminal, upon Johnson's return from a run, that he would

no longer have any flower runs because Boone had transferred the work to the Anderson terminal since the Montvale drivers had voted to organize. Dickenson told him that, since drivers from a unionized terminal could not deliver flowers, this work would be given to the Anderson terminal because it was non-union.

During the approximately six weeks that flower runs were being handled by Montvale drivers, this business accounted for about 28 or 29 Montvale runs per week, except for a temporary peak during the week before Easter. However, no additional drivers were hired to perform this work. The gross revenue derived from flower deliveries amounted to above $18,000 and $20,000 per week, with the exception of the week before Easter. The balance of the Montvale business during this period of time was accounted for by regular milk runs from

Lynchburg and bakery runs from the Kroger bakery at Roanoke, as was the case both before and after the temporary use of Montvale drivers for floral runs. For the week ending March 1, 1986, the last full week before flower runs began, the Montvale terminal aggregated gross revenues of $33,066. During the week ending April 26 - the first week for which there was no Montvale flower business - the Montvale terminal derived gross revenues of $33,431 from its milk and bakery deliveries. On April 21, the Respondent reassigned six milk runs per week, going from the Kroger-Westover dairy at Lynchburg to Savannah, Georgia, from Montvale drivers to Charlotte-based drivers in order to tie in with some Charlotte-based runs which were being started up for A & P in and about Greensboro. The loss of this work reduced

the amount of work available for Montvale drivers by some 2,700 miles per week.

On May 3, 1986, Boone sent identical letters to Mullins and Jerry Lee Holland, the two Montvale drivers with the least seniority, notifying them that they were being laid off for lack of work. According to Respondent, the lack of work in question was the loss of flower runs by Montvale drivers and the decrease in milk runs from Lynchburg by Montvale drivers. Evidence in the record showing gross revenue derived by the Respondent from its Montvale operation during late April and May indicates that, between the week ending April 26 and the week ending May 31, weekly revenues remained about the same with minor upward and downward fluctuations. These revenues were either the same or slightly in excess of the weekly gross revenues for Montvale in February, 1986, notwithstanding the loss of

six milk runs per week by the Montvale terminal to Charlotte drivers.[4]

Early in May Dickenson and Johnson engaged in a conversation at Dickenson's office. On this occasion Dickenson told Johnson that Boone was not going to negotiate a contract with Local 171. He observed that what was going to take place would resemble the events at a nearby Pepsi Cola plant where the drivers voted to unionize but the company had dragged out negotiations for five years without agreeing to a contract. Dickerson then cut himself short, stated that perhaps he had said too much, and walked away.

On or about June 13, Kroger decided to close its Roanoke bakery. This bakery

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[4] Since Respondent bills its customers and pays its drivers on a mileage basis, gross revenues and mileage are parallel measures of work available.

employed about 150 people and supplied baked goods for all of Kroger's stores in the southeast United States. Instead of supplying these stores from Roanoke, Kroger decided to ship baked goods from its bakery in Columbus, Ohio, to its Salem, Virginia, warehouse (near Roanoke), and then transfer these items directly from Salem to the retail outlets formerly supplied from Roanoke. Kroger gave the Respondent only a few days notice of this change an operations.

Boone bid on transporting baked goods from the Columbus bakery to Roanoke for Kroger, despite his assertion that he did not have the equipment to perform the job had he won the bid. He did not win the bid and Kroger decided to perform the work with its own fleet and with company drivers. On June 13 the Respondent laid off four drivers - Malcolm Bonhotel, Randolph Custer, Albert

Conner, and Jerry Durham. It also laid off utility man James Meador.[5] Boone sent each of these men a letter, dated June 13, which read:

> Because of a permanent loss of a portion of our business at the Montvale facility, it is necessary to reduce our work force accordingly.
>
> It is with deep regrets (sic) because of the above we find it necessary to terminate your employment effective June 14, 1986.

The layoffs were made in accordance with seniority. On July 6, Bonhotel and Custer were recalled and continued to work until August 22.

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[5] A utility man works in the terminal yard jockeying trucks about, changing tires, and doing similar work. Occasionally utility men were assigned to take over-the-road runs. Such assignments have been a matter of dispute between the Union and the Respondent, especially if made when regular drivers are in layoff status.

Roanoke bakery deliveries amounted to about 1/7th of the work which was handled by the Montvale terminal in June, 1986, whether measured in mileage per week or in gross revenues. Approximately 35%-40% of the Kroger bakery delivery work from Roanoke was handled by Anderson drivers and an occasional run was made by a Charlotte-based driver. There is no evidence in the record that the closing of the Kroger bakery caused layoffs at either of these locations. In fact, during the following two months, the Charlotte terminal hired seven additional drivers. Evidence placed in the record by the Respondent shows that Montvale gross revenues in June - the month in which Kroger terminated its bakery runs - was $118,932, while Montvale gross revenues in July, which included no Kroger bakery runs, was $120,705. Other data supplied by the General Counsel showing weekly earnings at

Montvale indicated an increase in weekly revenue from Kroger-Westover Lynchburg milk runs beginning in mid-June. In the four weeks preceding the Kroger bakery shutdown, Lynchburg milk runs brought in $115,745. In the four weeks following the bakery shutdown, milk runs brought in $120,337, an increase of $4,632.

While these events were taking place at the terminal, efforts were being made by the newly certified Union to begin collective bargaining negotiations. On May 2, Jim H. Guynn, the Union's Secretary-Treasurer, wrote Boone a letter in which he stated that "you are requested to contact me immediately so we can agree on dates for contract negotiations."[6] On May 6, Boone

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[6] Guynn and Boone have known each other for a long time. Guynn sits from time to time on the Teamsters Piedmont Joint Council, which includes various locals in Virginia, North Carolina, and elsewhere. As an employer covered by a Teamster contract at his Charlotte terminal, Boone has had occasion to serve as a management representative to this Council.

acknowledged receipt of the letter, telling Guynn that he would be out of town for the next couple of weeks and would be in contact with him in late May.

The first of five negotiating sessions between the parties took place at the Cresta Motel in Roanoke on June 17, just four days after the above-mentioned shutdown of the Kroger bakery and layoff of five Montvale employees. The Charging Party herein also represented the laid off Kroger bakery employees, so Guynn and other Union officials were well aware of the closing of the Kroger bakery when the Boone negotiations began. Boone opened the meeting by presenting Guynn with a notice which had been posted at the terminal the same day. The notice stated:

> To all Montvale personnel:
>
> We, along with all of you, were greatly surprised to learn that the

Kroger Roanoke Bakery was closed down permanently this past Friday, June 13, 1986.

It has become apparent that the remaining business will not support the Montvale terminal operation and consequently the Montvale operation will be closed in the near future.

A part of the business will be moved into our Charlotte operation and we will also open a new drastically reduced "skeleton" facility in the vicinity of Lynchburg. If anyone would like to be considered for a transfer to Charlotte or for a position at the new operation in Lynchburg, please indicate so by signing below. You must indicate your interest by the end of business on June 24, 1986 as this notice will be removed from the Board at that time.

Places were left at the bottom of the notice so that drivers could sign indicating whether or not they wished to be considered for a Charlotte transfer or for a job at Lynchburg. Guynn asked Boone how many employees he proposed to transfer to Lynchburg. Boone replied, "Five or six." Boone also indicated that he would offer transfers to Charlotte for four drivers and the balance would be terminated. He told negotiators that he had not as yet found a new location in the Lynchburg area but insisted that the closing of the bakery required him to move. Guynn replied that he did not see how the closing of the bakery, affecting as it did only a few of the Respondent's drivers, could justify the closing of the terminal, adding that he had been told before that the terminal would be closed if the Union came in. He warned Boone that it would not do him any good to

move to Lynchburg since that area was still within his Union's territorial jurisdiction.

The parties went on to talk about contract terms. Guynn told Boone that he was not out to get something better than what union drivers were enjoying at Charlotte, and said that he was ready to accept the Charlotte contract for Montvale drivers. Boone replied that he was not happy about certain things in the Charlotte contract and that he was not ready to agree to it at Montvale.

Sometime in April or May the Union had filed unfair labor practice charges against the Respondent which were ultimately dismissed. Boone told Guynn during this meeting that he had been in business for a long time and this was the first time that charges had ever been filed against him. Guynn's reply was that possibly Boone had never treated another union the same way

that he was treating Local 171. Guynn insisted that his union would not see its work being transferred to Charlotte and roll over and play dead. The reference was to the use of Charlotte-based drivers to handle milk runs from Lynchburg which had previously been driven by Montvale drivers. Boone's only reply was that he was going to relocate the terminal regardless of anything that Guynn might do, and indicated that the move would take place in about sixty days.

Bonhotel, a driver who was part of the Union's negotiating committee, brought up a statement ascribed to Boone by McGalliard to the effect that Boone had a lock on the gate and could close it any time he wanted. Boone replied that he had been around for thirty years and knew better than to say something like that. With reference to the language in the notice which Boone had posted and handed to Union representatives,

Guynn took exception to the use of the word "terminated", insisting that "layoff" was the proper term, and that laid off employees should be returned to work if there was sufficient work to warrant recall. Guynn asked Boone if he had given employees an opportunity to convert their health insurance. Boone replied he had not done so but that he would. Guynn also asked Boone if he had any severance pay for laid off or terminated employees. Boone replied that he had a retirement plan and that employees could withdraw their contributions from this plan when they retired. Boone then asked Guynn if he intended to file new unfair labor practice charges. Guynn replied in the affirmative.

The parties then reviewed the Charlotte contract item by item. When they reached the question of seniority, Guynn objected that a utility man was being used to make

deliveries while regular Montvale drivers were in layoff status. He told Boone that he wanted contract language which would eliminate this practice. As the discussion wore on, Boone told Guynn that milk runs were the only work that Lynchburg drivers would be doing so he did not need as many people as before. He stated that deliveries would be made from Lynchburg to Myrtle Beach, Fayetteville, Greensboro, and elsewhere, and that these runs would be driven either by Lynchburg (i.e. Montvale) drivers or by Charlotte drivers as the company saw fit. When the meeting broke up, Guynn told Boone that he would like the Company to present him with a final offer at its next meeting. Boone said that he would do so but would like to have some time to formulate such an offer.

At or about the same time that the Respondent was announcing the five layoffs

and holding its first negotiating session with the Union, it was also changing its dispatch procedure. Until mid-June, the Respondent had long followed the practice at the Montvale terminal of posting runs and allowing drivers to bid on those runs in order of their seniority. Because the Respondent's weekly business was stable and repetitive, the runs in question were fairly well fixed and quite repetitive. (For instance, Monday-Wednesday-Friday milk runs from Lynchburg to Charleston, South Carolina, or Tuesday-Thursday-Saturday from Roanoke to Landover, Maryland). Respondent also had an extra board to accommodate any additional business which might arise. Drivers were asked to bid about every six months or so on their choices of runs. In mid-June, at the time of the closing of the Kroger bakery, the Respondent posted the

following notice, dated June 17, and signed by McGalliard:

To all drivers:

In view of our losing the bakery part of our work, we are going to have to change our work dispatch in order to cover all loads from the dairy.

Starting Sunday, June 22, 1986, we will place all drivers on the Board. We will start at the top on this date and work down the list each week as we do the Board now. After the first trip is made we will then dispatch by money earned. The least amount of money earned will get the biggest paying load out.

You will have to check the line up each day between 1:00 and 1:30 pm to get your next working assignment. If you are placed in the first and second call position be sure you are available to work in case some one gets sick. On

Saturday you can check the line up any time after 9:00 am.

We believe this will be the best way to give the excellent service that you have given Kroger and to be able to spread the work among the drivers we have left.

The net effect of this change was to abolish the sets of regular runs to which drivers had previously been assigned each week and place most runs on an individual rotation basis to be assigned without regard to seniority.

Boone presented a copy of this notice to Union negotiators at a meeting which took place on June 18. He described how he thought the new plan would work and referred to it as a "rolling" assignment procedure. Boone said it was designed to provide equal earnings for all remaining drivers in that the driver making the lowest earnings in any

given week would be the first to be assigned a run the following week.[7] After discussing the new procedure for a while, the parties went on to discuss the Charlotte contract item by item and its possible applicability to Montvale, but no agreements were reached on any provisions. Union negotiators noted during the course of this session that the Company was now using 12 drivers to operate 33 regular runs, plus warehouse runs, and argued that there was more work currently available st Montvale than there were drivers to do the work. Company negotiators made no immediate response to this contention, but, as found above, on July 6 the

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[7] Sometime during the summer of 1986, McGalliard told driver Shurwood Spicer that the new dispatch procedure would be in place only until the Montvale terminal moved to Madison Heights. In fact, the old bid procedure was reinstituted at Madison Heights in September after the relocation was completed.

Respondent recalled drivers Bonhotel and Custer from layoff.

The parties to these negotiations met again on July 1. Before this meeting occurred, a number of laid off drivers were called by McGalliard or other supervisors and told that, if they wanted to work in Charlotte, they should report to that terminal in a few days ready to go to work.[8]

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[8] Laid off drivers Mullins and Holland each received letters from McGalliard, dated June 30, offering them work in Charlotte beginning on July 6. Neither accepted. Stultz, a senior driver, wrote on the bulletin board a notice soliciting transfer applications that he preferred Lynchburg but would go to Charlotte. On a Wednesday he was called by McGalliard and told that Boone wanted him to be in Charlotte the following Sunday to go to work. Stultz objected that this was rather short notice and inquired if the Montvale terminal had been closed. McGalliard replied that it was not yet closed and asked Stultz if he wanted to go to Charlotte. Stultz replied that he would go to Charlotte if that was all that was left. Later he informed Dickenson that he did not want to go to Charlotte "right now." Eventually Stultz ended up with an assignment to the Respondent's relocated terminal in Madison Heights.

On June 27, Guynn sent a telegram to Boone protesting instructions given to certain drivers to report by June 30, claiming that this was insufficient notice and in violation of an understanding that Boone had reached with the Union at their previous meeting. This issue was raised again at the beginning of the July 1 meeting. Boone told Guynn that it was not his intention to require Montvale drivers to relocate to Charlotte so abruptly since the Montvale terminal would be operating for another sixty days. Guynn said that he would never agree to permitting the relocation of Montvale drivers to Charlotte while the Company was sending Charlotte drivers to Roanoke to perform work which Montvale drivers had previously done. He had in his possession a list of the runs in question and gave them to Boone to support the argument that the Montvale terminal could

not operate with only 5 or 6 drivers. Reference was made to Kroger stores in Myrtle Beach, Fayetteville, and elsewhere, which were receiving deliveries of milk from the Kroger-Westover plant in Lynchburg, and certain runs from Lynchburg to Savannah which had been performed by Montvale drivers but which had been discontinued just after the election. Neither Boone nor McGalliard made any response to Guynn's allegation nor did they challenge the accuracy of his information. Boone simply said that he would put up a notice asking drivers if they were interested in transfers to Charlotte or elsewhere within sixty days and stated that the Company was going to go forward with this change in its operations regardless of any objections the Union might have. Guynn said that he objected to seeing 5 or 6 drivers perform work which 23 drivers and maintenance men had done at the time of the

election, adding that he would call a meeting and take a strike vote over this action by the Company. The parties went on to discuss various contract items but no agreements were reached. Union health and welfare proposals, pension plan proposals, and checkoff were the major sticking points. Guynn also objected to the new dispatch procedure which had been inaugurated on June 17. Boone told him to make a proposal for a dispatch procedure which the Union felt would be equitable but expressed the opinion that dispatch procedures normally should not be discussed until a contract had been agreed upon, as was his practice at other terminals. Guynn's reply was that there was no sense in worrying about a dispatch procedure until the parties got something agreed upon in the contract. The meeting broke up with Guynn again asking Boone to

submit to the Union a final offer. Boone said he would do so in a couple of weeks.

On the following day Guynn sent Boone a letter confirming a bargaining session on July 15. The letter also stated that "it is . . . our understanding that you will present your final contract offer on July 16, 1986." By letter of July 8, Boone replied, confirming the July 15 meeting date but stating "since you will respond to our proposal of July 1, 1986 at our meeting on . . . July 15, 1986, we cannot be prepared to make a final offer on Wednesday, July 16, 1986, and at this time we are unsure as to when we will be in a position to make a final offer." To date no such offer has been made.

The parties met again on July 15, as agreed. The Union advanced a seniority proposal which included a provision prohibiting utility workers from handling

over-the-road runs if regular drivers were on layoff status. It pressed again for acceptance by the Respondent of the Charlotte contract for Montvale drivers. No agreement was reached. Boone said that he had no proposals to make because his secretary was on vacation so he did not have an opportunity to put such an offer together. He did make it clear to Union negotiators that he would never agree to checkoff demands or to the Union's proposals for a pension plan and health and welfare benefits.

In early July, the Respondent listed the Montvale terminal with a real estate broker. As of the date of the hearing in this case it had not yet been sold.[9] It did not

[9] In addition to issuing a complaint in this case, the General Counsel has also sought temporary relief in the United States District Court under Section 10(j) of the Act, asking the Court to restrain the Respondent from selling the Montvale terminal until the Board can act in the instant complaint case.

obtain alternative premises in the Lynchburg area until late July or early in August, when it leased part of a shopping center in Madison Heights, some 37 miles away, for a reduced scale terminal. On July 24, the Respondent posted the following notice, signed by Boone, at its Montvale terminal:

> Very shortly we will be moving a portion of our remaining terminal operation to our new location in Madison Heights, Virginia. There will be an opportunity for six (6) drivers, by seniority, to relocate at this facility. The projected date of the relocation is estimated to be August 10, 1986.
>
> Since it is imperative that we return the Charlotte related milk runs back to the Charlotte operation, it will be necessary to increase the number of Charlotte drivers by four (4). If anyone, who is qualified, wishes to

relocate in Charlotte please indicate so by signing below. Please do not sign unless you are sure you will be willing to relocate as we must have a commitment that we can depend upon.

Due to reduction in the size of the operation at the Madison Heights location, it is with regret that we will find it necessary to place all other employees in permanent lay-off.

At the bottom of the notice were spaces for signature under headings which stated "Will agree to relocate in Charlotte" and "Will report for duty in Charlotte by the below date."

On August 3, the Union called a meeting at its hall on Melrose Avenue in Roanoke for the purpose of taking a strike vote. The employees who attended voted unanimously to strike, but the beginning of the strike was postponed about two weeks. Meanwhile

the Montvale terminal continued to operate beyond the projected August 10 relocation date which was contained in the Respondent's July 24 notice.

The Montvale terminal was still in operation on Sunday evening, August 17, when the Union began its strike. The Union picketed the Montvale terminal and sent pickets to Charlotte to picket the Charlotte terminal. The strike lasted only two days and was terminated on Tuesday morning, August 19. Guynn caused to be delivered to the Montvale terminal manager a letter on August 19 which stated "On behalf of all striking employees we hereby request immediate and unconditional reinstatement." On the same day Boone replied to Guynn in writing as follows:

> This will acknowledge receipt of the letter dated August 19, 1986, that was

hand delivered to our Montvale Terminal Manager by Mr. Sherwood this date.

We have a need for three (3) additional drivers at our Madison Heights location beginning Sunday, August 24, 1986. Those three (3) drivers by seniority, will be:

Shurwood K. Spicer

Wilbur G. Gobble

Cecil M. Stultz

These three drivers MUST call in by noon on Friday, August 22, 1986, for their job assignments beginning Sunday, August 24, 1986. The Madison Heights telephone number is 804-847-7802. If they do not call in they will be considered as "quit" and we will continue down the seniority list until we acquire the three drivers needed. We are recalling three drivers on condition that there will be no future work stoppages

without proper notification. A copy of this letter is being sent to each of the above drivers at their homes so they will know exactly what is expected.

We still have need for some drivers at our Charlotte location should anyone wish to reconsider and apply for a driver position at that operation.

Regrettably, all other personnel will be placed in permanent layoff.

On the following day, Boone sent Guynn another letter, acknowledging receipt of Guynn's August 14 letter which asked for a date for future negotiations. Boone stated that he had several conflicts during the month of September but would work toward a meeting "at the convenience of both of us."

On August 21, Boone sent layoff notices to seven Montvale employees. These notices stated that "due to the reduction in business and the ensuing realign (sic) of work

we are forced to reduce our work force. Regrettably, this is your notice of lay-off effective Friday, August 22, 1986." The notice was sent to Bonhotel, Custer, Mullins. Johnson, Lynch, Brian Noakes, and Sparks. Respondent admits that its action in opening the Madison Heights operation on August 24 was accelerated by the August 17-19 strike at Montvale. Its personnel roster at Madison Heights, as of October 1, included eight drivers and one utility man,[10] all operating under the immediate supervision of T. J. (Jack) Dickenson. McGalliard was transferred back to Charlotte and is now employed as a dispatcher at that location. With the exception of Stultz and Spicer, no drivers who participated in the

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[10] The eight drivers in question are Spicer, Tanner, Gobble, Mallow, Stultz, William Dickenson, Hawkins, and Burton. The utility man is Andrews.

August strike are employed at Madison Heights, notwithstanding Boone's assertion that offers of employment at that location would be made in order of seniority. Johnson and Lynch, who participated in the strike, were given permanent layoff notices while Hawkins, a junior employee to Lynch, was hired, and Burton, who was junior to Johnson and worked during the strike, was promoted from utility man and assigned to work as a driver. Johnson went out on strike, as did Brian Noakes, who was also senior to Burton. Lynch asked McGalliard sometime late in August after the strike was over why he was laid off. McGalliard's only reply was that Lynch would have to ask Boone. No explanation for this departure from seniority is to be found in the record.

The parties were scheduled to meet again in Roanoke for negotiations late in September but, on the morning of the schedu-

led meeting, Boone phoned the Union from Charlotte and told them that he could not attend because of an illness in his family. No meetings have taken place since that time. Late in September, driver Mike Mallow asked Dickenson to type up a written draft of a proposed petition to be circulated among Madison Heights drivers seeking the ouster of the Union. Dickenson did so. The letter, addressed to Boone and dated September 22, read:

> We, the undersigned, are expressing our position on the negotiations with any union. Being a majority at the Madison Heights Truck Terminal, we want to end any and all negotiations with the Union Local 171 or any other union leadership. We the employees of the A. G. Boone Co. do not wish to be represented by anyone other than ourself. It will be the benefit and concern of all if this

situation of a union is brought to an end of discussion. (sic)

The document introduced into evidence contained the signatures of six drivers.

Dickenson kept the letter in his office at the Madison Heights terminal and solicited signatures from employees as they returned from their respective runs. On one such occasion, Stultz came into the office to report damage to a truck. Dickenson exhibited the letter to him but Stultz returned it. Dickenson asked, "Aren't you going to sign it?" Stultz replied that he would rather think about it. Shortly thereafter Stultz reported this conversation to the Union and an unfair labor practice charge was filed concerning the incident. About a week later, Stultz had occasion again to be in Dickenson's office. Dickenson pointed to the letter and insisted that it was not his but Mallow's letter.

Stultz disputed Dickenson's statement, saying that if he had known it was Mallow's letter he would have ignored it. Dickenson then mentioned that someone had reported their earlier conversation to the Union hall and Stultz admitted that he had done so. Dickenson asked why and Stultz replied that he felt that he had been under pressure so he wanted to protect himself. Dickenson repeated that he had told Stultz that the letter was not his but Mallow's, but Stultz again disputed that statement. They then went to look at a trailer that was reported damaged. Dickenson asked Stultz if he had broken it on something. Stultz's immediate reply was, "Don't go trying to make nothing out of it. I picked it up at the dairy like that." Dickenson told him that he had better go back to the Union hall and change his story because the disputed letter was Mallow's letter, not his. Stultz refused,

saying that he had already signed an affidavit. Dickenson also presented the petition to Spicer on three occasions and asked Spicer to sign it, but Spicer refused.

Late in September, the Respondent gave its Madison Heights employees an increase in their rates: Mileage rates were raised from 23-3/4 cents a mile to 24-1/4 cents a mile. "Dropping the hook", i.e., leaving an empty truck at the dairy to be loaded, was raised from $4.50 to $4.75. The hourly rate for waiting time during loading and unloading was raised from $9.15 an hour to $9.30 an hour. None of these raises were negotiated with the Union or agreed to by the Union.

C. Analysis and Conclusions

1. Statements in Violation of Section 8(a)(1) of the Act

On more than one occasion over the years, Dickenson had told job applicants at

Montvale that the terminal was going to be run on a non-union basis and would be closed if it ever became unionized. On one occasion he told Bonhotel that Boone had said that the Respondent had closed its Atlanta terminal because it had become unionized. Boone partially confirmed this statement in his own testimony at the hearing. While pleading lack of union animus, the Respondent has compiled a track record of closing four unionized satellite terminals and opening two non-union satellite terminals in addition to its unionized operation at Charlotte. The statements herein are barred from prosecution by Section 10(b) of the Act but, taken together with the Respondent's conduct elsewhere, they demonstrate a strong and determined hostility to the unionization of the Montvale terminal or, for that matter, any terminal other than the principal one.

(a) When, in February, 1986, McGalliard told Mullins and Durham that, if employees voted the union in, the flowers would be the first to go, the Respondent threatened to transfer or discontinue work from the Montvale terminal in reprisal for union activities of Montvale employees and, in so doing, violated Section 8(a)(1) of the Act.

(b) When McGalliard told Mullins and Durham that Boone had already informed him that he was not going to give Local 171 "one red cent", the Respondent was threatening to refuse to honor its obligation to bargain with the Union in good faith in violation of Section 8(a)(1) of the Act.

(c) When Dickenson asked Johnson and Mallow to try to talk the Union down because Boone would lock the gate if the Union was voted in, the Respondent was threatening employees with reprisal for supporting the

Union and, in so doing, violated Section 8(a)(1) of the Act.

(d) When McGalliard told Spicer that, if the Union came in the Respondent would close the Montvale terminal and he (McGalliard) would go back to Charlotte, the Respondent made an illegal threat which violated Section 8(a)(1) of the Act.

(e) When McGalliard told an unidentified driver in the presence of Holland that, if the Union came in, the drivers would probably be out of a job, the Respondent made another illegal threat which violated Section 8(a)(1) of the Act.

(f) When Dickenson uttered a threat to Stultz that the Company would close the terminal if the Union came in, the Respondent violated Section 8(a)(1) of the Act.

(g) When, on another occasion, Dickenson told Stultz that, when he found out who the

sixth "s.o.b." was who was "in on this union deal, he would fire him", the Respondent was guilty of a threat which violated Section 8(a)(1) of the Act.

(h) When McGalliard asked Bonhotel if he knew anything about the union business and stated thereafter, "if the Union comes in, I got the lock", the Respondent was guilty of coercive interrogation and a threat to close the plant which violated Section 8(a)(1) of the Act.

(i) When, after the election, Dickenson told Lynch that flower runs between Simpsonville and Montvale were being discontinued because the Montvale drivers had voted to unionize, the Respondent was guilty of threatening reprisal for union activities in violation of Section 8(a)(1) of the Act.

(j) When Dickenson uttered the same statement relative to the transfer of flower runs from Montvale drivers to Anderson

drivers, the Respondent herein was guilty of a violation of Section 8(a)(1) of the Act.

(k) When Dickenson told Johnson that Boone was not going to bargain in good faith with the Union, the Respondent again herein violated Section 8(a)(1) of the Act.

(l) Dickenson's assistance to Mallow in mid-September in preparing and circulating a petition aimed at undermining the status of the certified bargaining agent amounted to much more than giving a casual or incidental piece of advice or information. Dickenson made much of the fact that the anti-union petition was Mallow's idea, not his own. This fact - if it is a fact - is quite beside the point. What is important is that Dickenson actively aided and abetted the preparation of the document by typing it himself and then systematically presented it for signature to all of the Madison

Heights drivers in his office at the Company terminal, thereby lending the Respondent's seal of approval and its active assistance to this effort. Regardless of who conceived the idea, the circulation of the document was more of Dickenson's work than of Mallow's. Moreover, as far as Stultz was concerned, Dickenson did not merely make the petition available. He engaged in a hard sell effort to get Stultz's signature - tendering the letter to Stultz on several occasions, interrogating Stultz about reporting his activity to the Union, and impliedly threatening Stultz with a write-up for damaging a Company truck because Stultz had resisted overtures to sign. By circulating among employees a petition aimed at undermining the Union's status as the certified bargaining agent of its employees, the Respondent violated Section 8(a)(1) of the Act.

2. The Lay-Offs of Mullins and Holland

On May 3, 1986, the Respondent laid off Montvale drivers Roger Mullins and Jerry Lee Holland. They were laid off in order of seniority. The Respondent's asserted reason for the layoffs was that there was no work available at Montvale for them to do. Like all of the Respondent's decisions which were made during the spring and summer of 1986, these layoffs were accomplished against a background of intense anti-union animus, including animus directed at both Holland and Mullins. The timing of the layoffs was also suspicious, in that they occurred within three weeks of the Union's victory in the representation election.

Boone testified that the decline in work at that time was occasioned by the discontinuance of using Montvale drivers to haul flowers from Simpsonville, South Carolina: for the Kroger Company, and the transfer to

Charlotte drivers of certain milk runs originating at Kroger's Lynchburg dairy to Savannah, Georgia. As noted above, the discontinuance of the flower runs in mid-April left the Respondent with the same amount of business at Montvale and the same number of drivers that it had in February before the flower runs began. In this regard, I agree with Respondent's counsel that the discontinuance of flower runs was something of a "wash" in assessing the Respondent's overall business activity in early May because, as far as flower deliveries were concerned, the Montvale terminal was in the same position in May that it was before this work was first undertaken in March.

However, credited testimony in the record discloses repeated threats and statements by Company supervisors, both before and after the April 13 election, to the effect

that a Union victory would mean loss of flower runs at Montvale. These statements of Company intentions cannot be ignored. More to the point, the Board cannot ignore the fact that other Montvale business, notably milk runs from Lynchburg dairy, brought in slightly more revenue in May than they did in February, notwithstanding the transfer of certain Savannah-bound runs to Charlotte drivers in mid-April. In light of these factors, I conclude that the overall loss of business at Montvale, relied upon by Boone in his testimony to justify these layoffs, is unsupported by the Respondent's own records and is in fact contradicted by those records. Thus, the Respondent's asserted reason for laying off Mullins and Holland is unfounded and necessarily pretextual. Accordingly, I conclude that, by laying off Jerry Lee Holland and Roger Mullins in reprisal for union ac-

tivities undertaken by members of the Montvale bargaining unit, the Respondent herein violated Section 8(a)(1) and (3).[11]

3. The Discontinuance of Making Flower Deliveries With Montvale Drivers

For a period of six weeks, Montvale drivers handled a portion of the flower deliveries emanating from the Kroger warehouse at Simpsonville, South Carolina. These runs were discontinued within days after the Union's victory at the representation election and in the face of repeated threats that a Union victory at the polls would carry in its wake the loss of the flower runs in question. However,

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[11] The fact that Holland and Mullins were not leading Union adherents or conspicuous in the Union effort at Montvale is irrelevant. They were the victims of anti-union reprisals aimed at the whole bargaining unit and were selected for such treatment because their positions at the bottom of the seniority list provided the Respondent the best available cover story for its unlawful conduct.

I credit the testimony of Kroger Manager of Traffic Operations Analaysis, Donna Folberth, that it was Kroger who directed Boone to discontinue using Montvale drivers for flower deliveries and to concentrate these deliveries exclusively in the hands of Anderson drivers, some of whom she described as "dedicated" or specialized drivers, i.e., personnel who handle flower delivery work and nothing else. Unless I were to conclude that Kroger was somehow in cahoots with Boone in defeating the organizing drive at Montvale, I would have to find that the decision to transfer the flower runs was Kroger's, not Boone's, and thus absolve Boone of any responsibility for the decision. There is no record evidence to suggest such collusion on the part of Kroger. Accordingly, I dismiss so much of the Consolidated Amended Complaint which alleges that the Respondent discontinued

making flower runs with its Montvale drivers in order to take reprisal against them for selecting the Union as a bargaining agent. This finding in no way detracts from the validity or seriousness of other findings, made above, that McGalliard and Dickenson repeatedly threatened drivers with loss of flower runs if the Union won the election. Respondent's basic tactic was that any stick was good enough to use against the Union, and the fact that some of its actions might have had a non-discriminatory foundation did not prevent the Respondent from using an adverse economic circumstance as just another context in which to communicate to its drivers the dire effects of unionization.

4. The June Layoffs

a. The 8(a)(3) violation

On June 14, the Respondent laid off the next four Montvale drivers in order of

seniority, bringing to six the total number of drivers in layoff status. The justification for this action was a notice, received the previous week, that Kroger had abruptly decided to close its Roanoke bakery and to supply its stores in the southeastern United States with bakery products originating from Columbus, Ohio, and delivered by its own drivers. Three weeks later, Respondent recalled two of the five laid off drivers, ostensibly because work was available for them and because it had made too drastic a cut in its employee complement on June 14. This sequence of events illustrated another feature of the Respondent's overall personnel policy following the Union victory in April, a tactic known in the bureaucracy as "sore thumbing", i.e., making the worst of an adverse circumstance or making the least of a favorable one in order to defeat or embarrass a policy or practice which the

decision-maker wishes to oppose. Assuming that the loss of one-seventh of the Montvale business brought about by the loss of bakery runs could justify some kind of curtailment in the operation, why did the Respondent in this instance resort to overkill and do additional and unnecessary damage to the work force at the Montvale operation by laying off more drivers than it could afford to do without? In light of the strong animus exhibited in various statements of its supervisors, including several statements that unionization would bring about the complete closing of the terminal, it is clear that the discharge of so many employees on June 14 was prompted, at least in part, by discriminatory motives. Additional evidence, including nuances found in written Company statements made at different intervals, suggests clearly that the entire layoff was part of its widely trumpeted on-

going scheme to close down the terminal completely, a fact which it accomplished within two months thereafter. Respondent's long-term commercial strategy at Montvale was an understandable effort to avoid putting all of its eggs in one basket by relying too heavily upon any one customer or any single source of business to support the terminal. Customers came and went, and there is no record evidence that the Respondent engaged in earlier layoffs when this happened at Montvale. It opened the terminal in 1979 when Kroger opened its Lynchburg dairy with the hope and expectation that other business would follow, and it did. In September, 1985, before the Charging Party had come on the horizon, McGalliard put out a memo to drivers outlining a new dispatch procedure in which he made this distinctly up-beat statement:

> We anticipate some additional business and we need to have more flexibility than we have now in order to better serve our customers and utilize our equipment and personnel.

As discussed before, Respondent acquired a great deal of new business in March when it replaced a competitor, Ryder, in the hauling of flowers for Kroger. During the same period of time, Kroger enlarged its grocery operation to include a newly purchased chain of stores called M & M. This acquisition brought in more work for Respondent's drivers. However, when the Roanoke bakery was closed by Kroger, Boone immediately announced in his layoff letter that the loss of a portion of the business at Montvale was permanent and that employees were not only going to be laid off but terminated, i.e., permanently separated. There was no basis for the Respondent's sudden change in

economic forecasting. As discussed above, this gloomy expectation was not even borne out by its own figures, which showed Montvale milk runs in late August bringing in some $13,000 more in revenue than they did in May, thus displacing entirely any loss of business occasioned by the discontinuance of bakery runs. Moreover, there is no suggestion that the loss of bakery runs prompted any layoffs at the Respondent's non-union facility in Anderson, despite the fact that 35%-40% of that work was handled by drivers operating out of the Anderson terminal.[12]

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[12] Boone testified that he had told supervisors and drivers alike long ago that the Montvale terminal would in fact close if the Respondent ever lost the Kroger bakery account. The possibility anticipated at that time was not that Kroger would close the Roanoke bakery but that it might give the delivery business from this bakery to another carrier or perform the work itself when its contract with the Respondent expired. Boone was a most unbelievable witness and his assertion, as set forth

(Continued)

All of these facts make it clear that the Respondent was "sore-thumbing" when it laid off five drivers on June 14, and that its asserted economic justification was a pretext to conceal its true motive, namely to take further reprisal against Montvale drivers for selecting the Union as their bargaining agent and to lay additional ground work for closing the terminal entirely. Accordingly, by laying off Bonhotel, Conner, Custer, and Durham on

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[12] above, was not corroborated. Stultz testified that he had heard Boone say that there was a "possibility" that the terminal would close if the Respondent lost the Roanoke bakery work. Another employee reported that Boone had once said that the terminal would close if Respondent lost the Roanoke bakery work and no other business could be found to take its place. However, those statements are a far cry from any certain and immediate effect upon the Montvale terminal from the loss of bakery work about which Boone says he warned employees in 1985 and earlier. The one day which elapsed between the closing of the bakery and the termination of four drivers is hardly enough time to cast about for additional business, if one is really interested in securing additional business.

June 14, the Respondent herein violated Sections 8(a)(1) and (3) of the Act.

b. The 8(a)(5) violation

The General Counsel has alleged that the layoff of five employees on June 14 on the occasion of the elimination of Kroger's bakery delivery business constituted an unlawful refusal to bargain. By June of 1986, the Union had been certified as the exclusive collective bargaining representative of all of the Respondent's Montvale driver and maintenance employees. As such it was entitled to bargain collectively with the Respondent concerning any aspect of wages, hours, and terms and conditions of all employees in that unit. The correlative responsibility which that right imposed upon the Respondent was the duty to notify the Union in advance of taking personnel actions concerning these matters and to afford the Union an opportunity, upon request, to

bargain collectively with respect to them. In this case, the first notice that the Union formally received from the Respondent that Boone was laying off five Montvale employees was given to it during its first bargaining session with Boone, which took place three days after the layoffs occurred. Frequently, collective bargaining agreements are structured to confer upon employers the complete right to lay off, transfer, or take other personnel actions which affect the status of employees without advance consultation or agreement by the bargaining agent. When such clauses appear in a contract, they are a collectively bargained waiver of a statutory right. However, no such contract existed, or now exists, between these parties which addresses either this or any other topic, so no waiver of this basic statutory right by the Union has ever taken place. Accordingly, before taking any

adverse action respecting any of its unit employees, the Respondent was and remains obligated to notify the Union and, upon request, to bargain collectively in good faith concerning its proposed action or actions. This the Respondent made no pretense of doing. Accordingly, by laying off five employees without bargaining in good faith with the Union concerning the layoffs, the Respondent herein violated Sections 8(a)(1) and (5) of the Act.

5. The Refusal of the Respondent to Bargain About the Relocation of the Terminal

The question of laying off employees is closely intertwined with the decision to relocate the Montvale terminal, but the two matters involve essentially two separate actions. In May, Boone laid off two employees. In June, he laid off five more, and in late August he laid off another seven, two of whom were June layoffs who had

been temporarily recalled. In short, within a four month period, a total of twelve employees had been laid off out of a bargaining unit of twenty three. On or about August 24, he closed the Montvale terminal and opened the Madison Heights terminal. Theoretically, the Respondent could have kept its terminal open at Montvale with a reduced staff. Conversely, it could have relocated to Madison Heights and taken along its full original complement of drivers and maintenance men. Accordingly, the two matters should be examined separately, even though they are different sides of the same coin.

The General Counsel alleges that the factor which unites these two efforts by the Respondent - layoffs and relocation - is the Respondent's deep and abiding animus and discriminatory intent. The Respondent repeatedly told employees at the time of the

election that if the Union won the election, the Montvale terminal would be closed. The Union won and four months later the Montvale terminal was closed. It won the election by a vote of 16 to 6. Eleven of the employees who voted in that election have been terminated, most of whom were necessarily Union supporters. Shortly after relocating the balance of the terminal in Madison Heights, the Respondent circulated a petition asking its remaining employees to repudiate the action which they took in April regarding union representation. Upon importuning by the Respondent, six of its remaining employees did so by signing the Mallow-Dickenson petition, thereby leaving the Respondent with a terminal in southwest Virginia having only one or two committed Union adherents, whereas, a scant six months before, it had a terminal full of Union drivers and a bargaining agent eager to

conclude a contract containing many of the same terms and conditions as another contract in Charlotte for which Boone had voiced strong distaste.

The General Counsel says that the transfer of the terminal from Montvale to Madison Heights is illegal on two counts - it was discriminatorily motivated and the Respondent refused to bargain in good faith concerning both the decision to transfer and the effects of the transfer. The Respondent's defense is that the relocation was economically motivated and that, under recent Board and court precedents, it was free to relocate its business without bargaining collectively over the decision. A determination as to the first of the General Counsel's contentions disposes of the Respondent's defense to the refusal to bargain allegation.

Boone testified that the Respondent's initial decision to open a terminal at Montvale, about 40 miles from the Kroger-Westover Lynchburg dairy, was prompted by Kroger's decision to open a dairy at that location in 1979 and the Respondent's desire to haul Kroger's dairy products from that location. At that time, the Respondent had no other business in the Roanoke area to support the Montvale terminal. It acquired the Kroger bakery business in Roanoke at a later point in time. Respondent's announced justification in 1986 for moving the terminal from Montvale, so it could be some 37 miles closer to Lynchburg, was that it no longer had any Roanoke business and it made economic sense to be closer to its only customer in the area. Boone also testified that the relocation would mean a savings of $80,000 a year in hauling costs for Kroger's Lynchburg dairy products, and that Kroger

wanted the relocation to take place so that it could enjoy the benefit of that saving. Neither the figure mentioned by Boone nor any figure has any support in any of the Respondent's records, nor do they have any other corroboration. At the time Boone gave this testimony, the relocation had been in effect only six weeks, and the Respondent admitted, in other parts of its testimony, that it had not yet compiled enough data to come up with any cost-per-mile figures for hauling goods at Madison Heights. Accordingly, its assertion of an $80,000 annual savings was a complete fabrication.

Moreover, Kroger's traffic analyst, whom the Respondent proffered as a witness, contradicted Boone, saying that Kroger had made no request for a terminal relocation. It should also be noted that Respondent's non-union terminal at Anderson is almost the same distance from Kroger's facility at

Simpsonville as Montvale is from Lynchburg. This fact has not Prompted the Respondent to make any corresponding move at that location to reduce Kroger's transportation costs. Moreover, the record indicates that, in order to open the Madison Heights facility, Respondent has had to lay out an additional $600 per month in rent while still bearing the basic cost of owning and maintaining the terminal at Montvale. After discounting Boone's unsupported assertions, it is clear from this record that Respondent moved its terminal from Montvale to Madison Heights in August to follow through on the threat its supervisors made in March and April, namely that the Montvale terminal would be closed if the Union won the representation election. Accordingly, the relocation is a violation of Sections 8(a)(1) and (3) of the Act.

Respondent contends that the Supreme Court decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), and the Board's subsequent decision in Otis Elevator Company, 269 NLRB 891, absolve it from any obligation under the Act to bargain with the Union concerning its decision to relocate. These decisions have no bearing upon this case, inasmuch as the principles announced therein are confined to situations in which the decision to relocate is untainted by any animus or discriminatory intent. Strawsine Manufacturing Company, Inc., 280 NLRB No. 63. Since the Respondent's basic motive in making the decision was illegal, it cannot be spared the consequences of its duty to bargain over that decision. Moreover, none of the decisions cited by the Respondent absolve an employer from bargaining over the effects of a decision to relocate, as distinguished from the basic decision

itself. In this latter regard, the Respondent herein was also remiss. Part of the decision and its effects included the opening of the Madison Heights terminal. Accordingly, by failing to and refusing to bargain collectively in good faith with the Charging Party concerning both its decision to relocate from Montvale and the effects of such a move, including the opening of the Madison Heights terminal, the Respondent herein violated Section 8(a)(1) and (5) of the Act.

6. The Discharge of Seven Employees on August 21

Throughout the spring and summer of 1986, the Respondent was continually transferring work from Montvale to Charlotte or Anderson to the detriment of employees in the Montvale bargaining unit. This was part of the "sore-thumbing" tactic aimed ultimately at removing union activists from its payroll

and redeeming its promise to lock the gate at Montvale. Taken by itself, the decision to transfer 2,700 miles of milk delivery work in April from Montvale to Charlotte drivers may not seem discriminatory in character. However, Respondent admittedly transferred that and other Lynchburg milk delivery work formerly performed by Montvale drivers to its Charlotte drivers and then added drivers to the Charlotte unit, soliciting Montvale drivers to work in Charlotte if they wished to do so.[13] At one of the negotiating sessions with the Union, Boone insisted on this right and announced that the Company would switch runs from

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[13] When new work arose, such as deliveries to Kroger's newly acquired M & M chain, Respondent elected to assign this delivery work either to its Charlotte or Anderson drivers, thereby taking its "sore-thumbing" policy vis-a-vis Montvale drivers even further.

Montvale or Madison Heights to Charlotte, and possibly even back again, whenever it chose to do so. The nature of the trucking business makes such relocations of work comparatively easy to do and to undo. All that is required is a minor change in dispatching from one terminal to another. The fact that the Respondent engaged in such activity repeatedly and on a broad scale totally undermines any economic defense that it might assert to justify laying off employees at Montvale. The fact that seven drivers were permanently separated the day after the August 17-19 strike ended,[14] and

[14] In deference perhaps to Guynn's criticism in June that a separation notice should use the term "lay off" rather than"terminate", the August 21 letters to drivers used the word "layoff." However, the letters also offered drivers assistance in helping them find other jobs. This language, as well as the phrase "permanent layoff" in the Respondent's posted notice of July 24, made it clear that the drivers in question were being fired, not temporarily denied employment.

the fact that the Respondent admitted that the strike had accelerated its planned move to Madison Heights clearly indicates that, by discharging Lynch, Johnson, Brian Noakes, Ricky Mullins, Sparks, Bonhotel, and Custer on August 21, the Respondent herein violated Section 8(a)(3) of the Act. By failing to negotiate these discharges with the Union, the Respondent herein also violated Section 8(a)(5) of the Act.

7. Unilaterally Changing the Dispatch Procedure

As described in detail above, the Respondent had long followed a practice at its Montvale terminal of assigning runs on a seniority bid basis, opening up the bid board periodically to accommodate changes in personnel or changes in available runs. The most senior driver bid on whatever set of runs were posted, and, because of the regularity of the Respondent's business,

could count on those assignments from week to week until bidding was opened up again. Then less senior drivers followed suit. Those at the bottom of the list bid on extra runs which were frequently posted on the extra board. With the loss of the Kroger bakery delivery business, the Respondent abolished this practice and instituted a rotating or "rolling" dispatch procedure in which seniority counted for little or nothing. Its excuse for doing so was that it wanted, so far as possible, to equalize the earnings of all drivers in the face of reduced business. Interestingly enough, after the Respondent opened the Madison Heights terminal in late August, it reinstituted the same practice of bidding on standard runs by seniority that it had followed at Montvale before June 17.

In bringing about this change in June, the Respondent simply confronted the Union

with a fait accompli. A notice outlining the new procedure was posted on the bulletin board and the Union was told about it the following day at the June 18 bargaining session. The Respondent went about implementing the new procedure the following week. It made no pretense of negotiating the change. Since it dispatch procedure involved a term or condition of employment, the Respondent was not free to change it unilaterally and was under an obligation to notify the Union of its desire to make the change, extend to the Union an opportunity to bargain over a proposed change, and, upon demand, bargain collectively concerning the change until either agreement or impasse was reached. When it failed to observe this legal requirement in June, 1986, concerning dispatching drivers at Montvale, the Respondent herein violated Sections 8(a)(1) and (5) of the Act.

8. Unilaterally Changing Wages at Madison Heights

Dickenson admitted in his testimony that, on September 28, the Respondent raised its wage rates at Madison Heights in three particulars - the mileage rate, the waiting time hourly rate, and the fee payable to a driver for "dropping the hook." Although the Respondent states that it still recognizes the Union as the bargaining agent for the members of its relocated unit, it made no pretense of notifying the Union or bargaining with it concerning these increases. By failing to do so, it violated Sections 8(a)(1) and (5) of the Act. Although this violation was not alleged in the Consolidated Complaint, it was fully litigated at the hearing, inasmuch as the Respondent's Terminal Manager admitted under oath the facts which constituted the violation which occurred.

9. Conditioning Reinstatement Upon Giving Strike Notice

In its letter of August 9 to the Union, a copy of which was sent to drivers Spicer, Gobble, and Stultz, the Respondent offered these drivers recall following the conclusion of the abortive strike and a place at its Madison Heights terminal, provided they called in by noon on the following Friday to accept. It also conditioned reinstatement "on condition that there will be no future work stoppages without proper notification." Neither the Union nor its members is under any legal or contractual obligation to give this Respondent any advance notice of a work stoppage, and both are free under the Act to strike this employer at Montvale and Madison Heights abruptly and without previous warning. Conditioning the reinstatement of employees on their willingness, or the willingness of

other employees, to forego the exercise of this statutorily protected right is a violation of Section 8(a)(1) of the Act. I so find and conclude.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. The A. G. Boone Company is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. Teamsters Local Union No. 171. affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drivers, hostlers, and service utility employees employed by the Respondent at its Montvale, Virginia, plant, and any

relocations thereof, excluding mechanics, office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law Number 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally changing its driver dispatch procedure; by unilaterally changing certain rates paid to drivers at its relocated terminal; by unilaterally laying off and discharging employees without first bargaining about their layoffs and discharges with the Union; and by unilaterally closing its truck terminal at

Montvale, Virginia, and opening up a truck terminal at Madison Heights, Virginia, to replace it, the Respondent herein violated Section 8(a)(5) of the Act.

6. By transferring bargaining unit work from its Montvale and Madison Heights terminals to other terminals; by laying off and discharging employees and hostlers at its Montvale, Virginia, terminal, and by closing its terminal at Montvale, Virginia, and opening a terminal to replace it at Madison Heights, Virginia, in order to take reprisal against employees for engaging in union activities, the Respondent herein violated Section 8(a)(3) of the Act. The employees in question are Jerry Lee Holland, Roger Mullins, Jerry Durham, Albert Conner, Randolph Custer, Malcolm Bonhotel, Carl R. Sparks, Sr., Ricky Mullins, Brian Noakes, Johnny Johnson, and Harold Lynch.

7. By the acts and conduct set forth above in Conclusions of Law Numbers 5 and 6; by coercively interrogating employees concerning their union activities and the union activities of other employees; by threatening employees with loss of job opportunities, discharge, and plant closure or relocation if they engaged in union activities; by threatening to discharge union adherents when their identities became known; by threatening not to bargain in good faith with the Union if it was selected by employees as their bargaining agent; by informing employees that bargaining unit work had been transferred to other locations because they had selected the Union as their bargaining agent; by conditioning the reinstatement of strikers on their agreement to refrain from striking without giving the Respondent advance notice; by threatening to drag out negotiations if the Union was

selected as bargaining agent; and by circulating among employees a petition aimed at undermining the status of the Union as bargaining agent, the Respondent herein violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein has committed various unfair labor practices. I will recommend that it be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found herein evidence an attitude on the part of this Respondent to behave in total disregard for the rights of its employees and the

obligations imposed upon it by Congress, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that Section of the Act. Hickmott Foods, Inc., 242 NLRB 1357. I will recommend that the Respondent be required to offer full and immediate reinstatement to the eleven employees found herein to have been illegally discharged, and will further recommend that they be made whole for any loss of pay or benefits which they may have suffered by reason of the discriminations found herein, in accordance with the Woolworth case,[15] with interest thereon computed at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. Olympic Medical Corporation, 250 NLRB 146; Isis

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[15] F. W. Woolworth Co., 90 NLRB 289.

Plumbing and Heating Company, 138 NLRB 716. I will also recommend that the Respondent be required to post the usual notice advising its employees of their rights and of the results in this case.

Respondent argues that, even if a violation is found in this case, the remedy to be applied should be limited to backpay. I disagree. This is an old-fashioned "run away shop" case and in such cases the Board, with court approval, has gone far beyond just letting a respondent off by paying a sum of money to its wronged employees. To restore the status quo, it will be necessary to require the Respondent to reopen the Montvale terminal and to transfer back to Montvale all of the work which was unlawfully transferred to Madison Heights, Roanoke, and elsewhere. NLRB v. Preston Feed Corporation, 309 F.2d 346 (4th Cir., 1962); NLRB v. North Carolina Coastal Motor

Lines, Inc., 542 F.2d 637 (4th Cir., 1976); Service Merchandise Company, Inc., 278 NLRB No. 23; B & P Trucking, Inc., 279 NLRB No. 92, and cases cited there at p. 16, slip opinion. The General Counsel also seeks a visitorial clause permitting discovery under the Federal Rules of Civil Procedure in the event that the Board's order must be enforced by a contempt proceeding in a court of appeals. Because of the flagrant and continuing nature of the Respondent's conduct, I will recommend such an order.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole. and pursuant to Section 10(c) of the Act, I make the following recommended:[16]

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent A. G. Boone Company and its officers, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Teamsters Local Union No. 171, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective bargaining representative of the drivers, hostlers, and service utility employees employed by the Respondent at its Montvale, Virginia, plant and any relocations thereof.

(b) Unilaterally changing dispatch procedures and wage rates, unilaterally laying off or discharging employees, and unilaterally closing its truck terminals and opening other terminals to replace them, without first notifying the Union and

bargaining collectively in good faith with it, upon request, until an agreement or an impasse is reached; provided that nothing herein shall be construed to require the Respondent to rescind any increases in wages or benefits which it has previously granted.

(c) Discouraging membership in or activities on behalf of Teamsters Local Union No. 171, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization, by transferring bargaining unit work from its Montvale. Virginia terminal or any other terminal to any other location, by laying off or discharging employees, by closing its truck terminals and opening other truck terminals to replace them, or by otherwise discriminating against employees in their hire or tenure.

(d) Coercively interrogating employees concerning their union or protected concerted activities or the union or protected concerted activities of other employees.

(e) Threatening employees with loss of job opportunities, discharge, plant closure, or plant relocation in reprisal for engaging in union or protected concerted activities.

(f) Threatening to discharge union sympathizers when their identities become known.

(g) Threatening to refrain from bargaining in good faith with the Union if it is selected as bargaining agent.

(h) Informing employees that bargaining unit work had been transferred to other locations because employees had selected the Union as their bargaining agent.

(i) Threatening to drag out negotiations if the Union is selected as bargaining agent.

(j) Conditioning the recall of strikers upon their agreement to refrain from striking without giving the Respondent advance notice.

(k) Circulating among employees a petition aimed at undermining the status of the Union as bargaining agent.

(l) By any other means or in any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer full and immediate reinstatement to Jerry Lee Holland, Roger Mullins, Jerry Durham, Albert Conner, Randolph Custer, Malcolm Bonhotel, Ricky Mullins, Brian Noakes, Johnny Johnson, and Harold Lynch to their former or substantially equivalent employment, without prejudice to

their seniority or other rights They may have previously enjoyed, and make them whole for any loss of pay or other benefits which they have suffered by reason of the discriminations found herein, in the manner described above in the section entitled "Remedy."

(b) Upon request,: bargain collectively in good faith with Teamsters Local Union No. 171, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective bargaining representative of the drivers, hostlers, and service utility employees employed by the Respondent at its Montvale, Virginia, terminal, and any relocations thereof, and if agreement is reached, embody the same in a signed, written contract.

(c) Reestablish the business operations of the Respondent at Montvale, Virginia,

and restore the work formerly performed there by terminated unit employees.

(d) Post at the Respondent's Madison Heights, Virginia, terminal copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof and shall be maintained by the Respondent for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or

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[17] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

covered by any other material. Respondent shall also mail a signed copy of the attached notice to each bargaining unit employee, including all those who were on its payroll at the time of the April 13, 1986, election. Such notices shall be mailed to the last known address of each employee.

(e) Notify the Regional Director for Region 5, in writing, within twenty days from the date of this Order, what steps the Respondent has taken to comply herewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner Provided by the Federal Rules of Civil Procedure. Such discovery shall be

conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

Insofar as the Consolidated Complaint herein, as amended, alleges matters which have not been found to be violations of the Act, the said complaint is hereby dismissed.

Dated, Washington, D. C. December 31, 1986.

Walter H. Maloney, Jr.
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

THE A. G. BOONE COMPANY IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD WHICH WAS ISSUED AFTER A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT refuse to bargain in good faith with TEAMSTERS LOCAL UNION NO. 171, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of the drivers, hostlers, and service utility employees employed at the Montvale, Virginia, plant and any relocations thereof.

WE WILL NOT unilaterally change dispatch procedures and wage rates, and WE WILL NOT unilaterally lay off or discharge employees or close truck terminals and open other terminals to replace them without first

notifying the Union and bargaining collectively in good faith with it, upon request, until an agreement or impasse is reached.

WE WILL NOT discourage membership in, or activities on behalf of, TEAMSTERS LOCAL UNION NO. 171, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization, by transferring bargaining unit work from our Montvale, Virginia, terminal or any other terminal to any other location, by laying off or discharging employees, by closing truck terminals and opening other truck terminals to replace them, or otherwise discriminating against employees in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union or protected, concerted activities, or the union or

protected, concerted activities of other employees.

WE WILL NOT threaten employees with loss of job opportunities, discharge, plant closure, or plant relocation in reprisal for engaging in union or protected, concerted activities.

WE WILL NOT threaten to discharge union adherents when their identities become known.

WE WILL NOT threaten to refrain from bargaining in good faith with the Union if it is selected as bargaining agent.

WE WILL NOT inform employees that bargaining unit work has been transferred to other locations because employees had selected the Union as their bargaining agent.

WE WILL NOT threaten to drag out negotiations if the Union is selected as bargaining agent.

WE WILL NOT condition the recall of strikers upon their agreement to refrain from striking without giving advance notice.

WE WILL NOT circulate among employees a petition aimed at undermining the status of the Union as bargaining agent.

WE WILL, upon request, bargain collectively in good faith with TEAMSTERS LOCAL UNION NO. 171, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive collective bargaining representative of the drivers, hostlers, and service utility employees employed at our Montvale, Virginia, terminal, and any relocations thereof, and if agreement is reached, embody that agreement in a signed, written contract.

WE WILL reestablish the business operations at the Montvale, Virginia, terminal, and

restore the work formerly performed there by terminated unit employees.

WE WILL OFFER full and immediate reinstatement to JERRY LEE HOLLAND, ROGER MULLINS, JERRY DURHAM, ALBERT CONNER, RANDOLPH CUSTER, MALCOLM BONHOTEL, RICKY MULLINS, BRIAN NOAKES, JOHNNY JOHNSON, and HAROLD LYNCH to their former or substantially equivalent employment and WE WILL make them whole for any loss of pay or benefits which they may have suffered by reason of the discriminations found in this case.

THE A. G. BOONE COMPANY
(Employer)

By:_____
(Representative) (Title)

Dated:_____

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its Provisions may be directed to the Board's Office, Candler Building - 4th Floor, 109 Market Place, Baltimore, Maryland 21202, Telephone (301) 962-2772.

No. 88-1367

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

A. G. BOONE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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22pp

QUESTION PRESENTED

Whether the record contains substantial evidence supporting the National Labor Relations Board's findings that petitioner violated the National Labor Relations Act by laying off employees and relocating a trucking terminal because the employees at the terminal engaged in union activities protected by the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Babcock & Wilcox Co., 257 N.L.R.B. 707 (1981) 16
Limestone Apparel Corp., 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982) 16
NLRB v. *American Geri-Care, Inc.*, 697 F.2d 56 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983) 16
NLRB v. *Charles Batchelder Co.*, 646 F.2d 33 (2d Cir. 1981) 16
NLRB v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) 13
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983) 13, 14, 15
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 18
The Artra Group v. *NLRB*, 730 F.2d 586 (10th Cir. 1984) 16
United States v. *Johnston*, 268 U.S. 220 (1925) 13
Universal Camera Corp v. *NLRB*, 340 U.S. 474 (1951) ... 13

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 6, 7, 9, 10, 11
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 6, 7, 9, 10, 11, 13, 17, 18
§ 8(a)(5), 29 U.S.C. 158(a)(5) 6, 9, 10, 11
§ 10(c), 29 U.S.C. 160(c) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 863 F.2d 946. The decision and order of the National Labor Relations Board (the NLRB or the Board) (Pet. App. 27-57), which incorporates findings, conclusions, and a proposed order by an administrative law judge (Pet. App. 58-165), are reported at 285 N.L.R.B. No. 133.

JURISDICTION

The opinion of the court of appeals was filed on December 9, 1988. The petition for a writ of certiorari was filed on February 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a trucking firm that operates in the southeastern United States, seeks further review of a determination that it violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3) and (1), when it laid off workers and closed its terminal in Montvale, Virginia, in response to successful efforts by respondent Teamsters Local No. 171 (the Union) to represent the employees there.

1. The facts are set forth at length in the decision of the administrative law judge (ALJ); with respect to the issues raised by the petition, that decision was adopted by the Board. Pet. App. 58-149.

Throughout the relevant period, petitioner specialized in the transport of groceries and related items, including items distributed by the Kroger food chain and other Kroger subsidiaries. Its headquarters and principal terminal were in Charlotte, North Carolina. From 1979 through 1986, it also operated from a terminal in Montvale, Virginia. Pet. App. 62.

a. Early in 1986, the Union began a campaign to organize employees at the Montvale terminal, and, on February 20, it demanded recognition from A. G. Boone, petitioner's owner and president. Boone refused to recognize the Union without an election. The Union filed a representation petition, and an election was scheduled for April 13. Pet. App. 66.

During the election campaign, Montvale Terminal Manager McGalliard and Assistant Terminal Manager Dickenson repeatedly told Montvale drivers that petitioner would close the terminal if it were unionized. McGalliard told drivers that, if the Union won the election, "they would close the terminal and * * * go back to Charlotte," and that "the drivers would probably be out of a job." Just

before the election, he asked a driver about the "union deal," and then said that "if the union comes in, I got the lock." Dickenson told two drivers to "try to talk the union down because if the union [was] voted in, Mr. Boone would lock the gate." He told another driver that he knew of five drivers "in on this union deal," and that as soon as he found out who the sixth driver was, he would "fire the s.o.b." Pet. App. 68-70.[1]

The Union nevertheless won the April 13 election by a vote of 16 to 6, and was certified as the bargaining representative for employees at the Montvale terminal on April 28 (Pet. App. 68-70).

b. Before the election, McGalliard told two Montvale drivers that work delivering flowers for Kroger would be discontinued if the Union won the election. Pet. App. 68. After the election, those flowers runs were transferred to petitioner's non-union terminal in Anderson, South Carolina (*id.* at 71), and Dickenson told another two drivers that the transfer was a result of the fact that the Union had won the election at Montvale (*id.* at 72-73). (In fact, the ALJ found, those runs had been transferred at Kroger's direction because of dissatisfaction with Montvale delivery arrangements. *Id.* at 75-77.) At about the same time, Dickenson told a driver that Boone would not negotiate a contract with the Union—referring to a nearby Pepsi-Cola plant where management had dragged out negotiations for five years after drivers had voted to unionize. *Id.* at 76.

Approximately a week after the election, petitioner transferred to its Charlotte terminal six runs previously

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[1] Prior to the election campaign, Montvale employees had been warned against participating in union activity. Two drivers, hired in 1981 and 1982, were told by Dickenson that, if a union ever came into the Montvale terminal, it would be closed (Pet. App. 66).

assigned to Montvale. Pet. App. 74-75. On May 3, petitioner notified the two Montvale drivers with the least seniority that they were being laid off for lack of work. *Id.* at 75.

On approximately June 13, Kroger closed its Roanoke bakery, which accounted for approximately one-seventh of petitioner's Montvale business. The same day, petitioner notified the four most junior Montvale drivers and one utility man (24% of its work force there) that they were terminated effective June 14, stating that the layoff was necessitated by the loss of a portion of the terminal's business. Pet. App. 77-79.

c. Petitioner's first meeting with the Union took place four days later, on June 17. Boone opened the meeting by presenting the Union with a notice that had been posted at the terminal the same day, stating that the Montvale operation would "be closed in the near future" due to the permanent closing of the Roanoke bakery. The notice added that part of the Montvale business would be moved to Charlotte, and that petitioner would open a "drastically reduced 'skeleton' " terminal in the vicinity of Lynchburg. Employees who were interested in working at Lynchburg or Charlotte were invited to sign the notice. Boone told the Union negotiators that he had not yet found a new location in the Lynchburg area, but that the closing of the bakery required him to move. He indicated that he would transfer five or six drivers to Lynchburg and would offer transfers to Charlotte to four drivers, but that the rest of the Montvale drivers would be terminated. He added that the relocation would take place regardless of anything the Union might do. Pet. App. 81-83, 85.

At a meeting the next day, June 18, the Union negotiators presented statistics which, they argued, demonstrated that there were more runs available at Montvale than there were drivers to handle them. Peti-

tioner made no immediate response, but, on July 6, recalled two of the drivers that it had laid off in mid-June. At a July 1 meeting, Union negotiators again argued that there was sufficient work to support the Montvale terminal and objected to petitioner's use of drivers from Charlotte to handle runs previously assigned to Montvale. Boone responded that he would put up a notice asking drivers if they were interested in transfers to Charlotte or elsewhere within 60 days, and would proceed with the announced changes in operations regardless of the Union's objections. Pet. App. 91-94.

On July 24, petitioner posted a notice at the Montvale terminal stating that the operation would move to Madison Heights on approximately August 10. The notice advised that there were six openings for drivers at Madison Heights, that those openings would be made available to applicants from Montvale on the basis of seniority, and that four drivers would be allowed to relocate from Montvale to Charlotte. The remainder of the Montvale employees, the notice said, would be permanently laid off. Pet. App. 98-99.

In response to this notice, the employees voted to strike the Montvale terminal on August 17. The strike began as scheduled. Pet. App. 99-100. Petitioner accelerated the move to Madison Heights in response to the strike. *Id.* at 103. Two days later, the strike ended and the Union requested reinstatement of all striking employees. Boone replied that petitioner would employ the three most senior employees at Madison Heights, effective August 24, on condition that there would be no future work stoppages without proper notification. He added that the Charlotte facility still needed some drivers, but that all other Montvale employees "will be placed in permanent layoff." On August 21, Boone sent permanent layoff notices, effective

August 22, to seven Montvale drivers "due to the reduction in business and the ensuing realign[ment]." *Id.* at 100-103.

Thereafter, eight drivers and one utility man were employed at the Madison Heights terminal, under the supervision of former Montvale Assistant Manager Dickenson. Of the drivers who had participated in the strike, only two were transferred to Madison Heights. Notwithstanding petitioner's earlier statements that jobs at Madison Heights would be available on the basis of seniority, drivers who had participated in the strike were passed over in favor of employees with less seniority who had stayed on the job. Pet. App. 103-104.

d. After the layoffs and relocation, petitioner solicited signatures on a petition seeking the ouster of the Union. The petition was initiated by a driver, but Dickenson had the petition typed, kept it in his office, and asked employees to sign it when they returned from their runs. Pet. App. 104-106.

e. On the basis of these findings, the ALJ concluded that petitioner had committed multiple violations of Section 8(a)(1), (3) and (5) of the NLRA, 29 U.S.C. 158(a)(1), (3) and (5). Pet. App. 108-147.

2. The Board, acting through a panel of three of its members, affirmed the findings and conclusions of the ALJ with respect to the violations at issue in this Court.[2]

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[2] Members of the panel filed majority and dissenting opinions which adopted, supplemented, qualified, and reversed certain of the ALJ's findings and conclusions. Pet. App. 27-51. Accordingly, for purposes of judicial review, the Board's decision consists of the ALJ's decision as supplemented and modified by the panel's opinions.

The Board affirmed all of the ALJ's findings of violations with the exception of the finding that petitioner violated Section 8(a)(5) by instituting a wage increase without first bargaining with the Union. Pet. App. 28-29, 41-43. That matter is not encompassed by the petition.

a. The Board affirmed without discussion the ALJ's conclusions that petitioner had committed twelve violations of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). Those violations included petitioner's threats to close the Montvale terminal, to transfer work to other terminals if the Union became the employees' bargaining representative, and to fire workers for engaging in union activities. The Board also affirmed the ALJ's conclusions that petitioner had violated Section 8(a)(1) by threatening to refuse to bargain in good faith with the Union, interrogating employees about their union activities, conditioning the reinstatement of striking employees upon the waiver of their right to strike freely, and assisting in the preparation and circulation of an anti-union petition. Pet. App. 28 (incorporating *id.* at 108-114).

b. The Board agreed with the ALJ that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), when, in retaliation for its employees' having selected the Union to represent them, it (i) laid off employees at the Montvale terminal in May, (ii) laid off additional employees in June, and (iii) closed the Montvale terminal, relocated to Madison Heights, and discharged a number of the Montvale employees. The Board discussed at length, and rejected, petitioner's contentions that these actions resulted from economic decisions untainted by anti-union animus. Pet. App. 27-40. One member of the panel, Chairman Dotson, dissented from the findings that the layoffs in May and June violated Section 8(a)(3) and (1). Pet. App. 46-51.

With respect to the layoffs of two employees in May, the majority of the panel emphasized the ALJ's finding that those layoffs had taken place "against a background of intense union animus" just three weeks after the Union had won the representation election. Pet. App. 30. The

majority rejected petitioner's argument that the layoffs were necessitated by the Montvale terminal's loss of the Kroger flower runs, finding that in the context of Montvale's business as a whole, those runs were "not significant." *Id.* at 32.

The majority of the panel also found that the layoffs of four additional employees in June "represented a further attempt by [petitioner] to fulfill its preelection threats and to close the Montvale facility," rather than a business decision taken in response to the closing of Kroger's Roanoke bakery. Pet. App. 36. The majority referred with approval to the ALJ's findings that petitioner had "resorted to 'overkill' when it laid off more drivers than it could afford to do without (approximately 24 percent of its work force in response to an approximately 14-percent reduction in its work)," that the announced layoffs had occurred without any efforts similar to those undertaken in the past to obtain replacement work, and that petitioner's asserted economic defense "was a pretext." *Id.* at 34-35. The majority of the panel concluded "that the economic data provided by [petitioner] is not sufficient to overcome the strong prima facie case established by the General Counsel by the preelection threats and the developing pattern of the fulfillment of those threats." *Id.* at 36-37.

With respect to petitioner's relocation of its Montvale operation, and the layoffs of seven employees in the process, all members of the Board panel found "no merit" in petitioner's contention "that the closing of the Montvale terminal was an economic decision motivated solely by the closing of the Roanoke bakery." Pet. App. 38. The Board said that petitioner had "failed to demonstrate a legitimate reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights when it was able to continue to operate its Montvale terminal with enough work for 15 drivers after the Roanoke bakery closing." *Id.* at 39. The Board concluded (*id.* at 40):

> The clear alternative explanation for the move is that [petitioner] wished to rid itself of the Union at the Montvale location by opening a significantly smaller facility elsewhere, [where] it employed only two of the employees who had participated in the strike.[3]

c. Finally, the Board found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain—or acting unilaterally—with respect to various matters, including the May and June layoffs, the relocation to Madison Heights and related layoffs, and changes in work assignment procedures. Pet. App. 28 (incorporating *id.* at 127-129, 136-137, 140-142).[4]

d. In its remedial order, the Board ordered petitioner, *inter alia*, to reinstate and make whole the employees it had unlawfully terminated, to reestablish the Montvale terminal, and to restore the work formerly performed there by employees who had been terminated. Pet. App. 44, 157-158.

3. The court of appeals affirmed and granted enforcement of the Board's order, except with respect to the Board's finding that the May layoffs violated Section 8(a)(3) and (1). Pet. App. 1-26.[5]

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[3] The Board found further support for this conclusion in the fact that, less than a month after the move, petitioner had solicited signatures on a petition by which its employees at Madison Heights could disavow support for the Union. Pet. App. 40.

[4] Chairman Dotson dissented from these findings with respect to the May and June layoffs and found it unnecessary, in view of his conclusion that the relocation in August was a violation of Section 8(a)(3), to reach the question whether petitioner had violated the Act by refusing to bargain over that subject. Pet. App. 47 n.1, 50-51.

[5] On the Union's appeal, the court remanded to the Board for further consideration of the necessity for inclusion of a visitatorial order, which the Board had found unwarranted. Pet. App. 23.

a. The court upheld the Board's findings that petitioner's managers, McGalliard and Dickenson, had "engaged in conduct designed to coerce employees into repudiating the Union" (Pet. App. 14) and thus affirmed the Board's conclusions that their threats to employees and miscellaneous other actions violated Section 8(a)(1) of the Act (Pet. App. 13-15).

b. The court also found substantial evidence to support the Board's determinations that petitioner had violated Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of the layoffs in May and June, by unilaterally changing its driver dispatch procedure, and by failing to bargain over the discharges of seven drivers in August. Pet. App. 16-17. The court did not reach the issue whether petitioner was obligated to bargain over the decision to relocate its Montvale operation, explaining that its conclusion that the relocation was a violation of Section 8(a)(3) made it unnecessary to address that question. Pet. App. 17.

c. The court then addressed the Board's findings that petitioner violated Section 8(a)(3) and (1) by laying off employees in May, June, and August and by relocating to Madison Heights. The court determined that petitioner's "early open hostility toward Union activity and its 8(a)(1) violations are clearly sufficient to establish a *prima facie* case that antiunion considerations were a motivating factor in its decisions" to lay off the Montvale employees in June and to close down and relocate that terminal in August. Pet. App. 20. The court also found "substantial evidence to support the Board's conclusion that [petitioner] 'failed to prove a legitimate [business] reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights.' " *Ibid.* With respect to the June layoffs, the court found that petitioner's records evidenced

nothing "but that its asserted economic defense is a mere pretext" (*id.* at 21).

Finally, the court reversed the Board's finding that the May layoffs violated Sections 8(a)(3). Pet. App. 22. Citing evidence that there were "substantial business concerns sufficient to prompt the layoff of two employees in early May," the court concluded that the record "clearly supports a finding that [petitioner] would have laid off two employees in May without regard to antiunion considerations." *Ibid.*

ARGUMENT

This case involves the application of well-established legal principles to the particular facts. In the final analysis, the only question presented is whether the record contains substantial evidence to support the Board's findings as to the motivation underlying petitioner's decisions to lay off workers and relocate its Montvale operation. That fact-bound question does not warrant this Court's review.

1. In this Court, petitioner contests only the determinations that it violated Section 8(a)(3) and (1) of the Act by laying off workers in June and August and relocating its Montvale facility. Thus, it does not challenge the Board's findings, upheld by the court of appeals, that it violated Section 8(a)(1) and (5) of the NLRA by (i) repeatedly threatening that it would close the Montvale facility or fire employees if the Union won the right to represent a bargaining unit at Montvale, (ii) unilaterally imposing terms on its employees without bargaining in good faith, and (iii) participating in an illegal attempt to decertify the Union.

Petitioner argues, however, that a sharp line should be drawn between these unequivocal indications of its anti-

union animus and what it characterizes as a "a concurrent but logically and factually unrelated decision to relocate its Montvale/Roanoke terminal operations to Madison Heights." Pet. 8. It also claims that the court of appeals overlooked "uncontradicted," "indisputable," or "undeniable" evidence of legitimate business reasons for relocating that terminal and scaling down its operations (*id.* at 12, 14, 15, 16, 26, 27, 39).

Obviously, neither the Board nor the court of appeals was obligated to adopt petitioner's view of the evidence. In this case, petitioner threatened to close its Montvale terminal and fire employees if the Union won the representation election. Within five months of the time that 16 of its 22 employees voted to be represented by the Union, petitioner relocated and laid off a number of its Montvale employees, including all but two of the employees who had exercised their right to strike. Under these circumstances, the Board was entitled to draw the natural inference that petitioner's actions were motivated by anti-union animus. The Board was not required to regard petitioner's clearly established efforts to coerce its employees and its refusals to bargain with the Union as separate from the question of why petitioner scaled down and relocated its Montvale operation shortly after it was unionized.[6]

Petitioner's contention that the court of appeals and the Board overlooked uncontradicted evidence of legitimate

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[6] Elsewhere in the petition, petitioner contends that its various attempts to coerce employees into rejecting the Union "*predated*" the decision to relocate or occurred "in other contexts." Pet. 20, 22, 25. It also suggests that evidence of petitioner's anti-union animus was "separate from," or "related to actions other than," the layoff and relocation decisions and that, at best, it was "indirect" evidence. *Id.* at 23-24, 30, 31. The Board and the court of appeals properly refused to accept these artificial characterizations of the proof in this case.

business reasons for its actions is equally unfounded. The ALJ, the Board, and the court of appeals each addressed the reasons that petitioner proffered for these decisions and rejected them as pretextual. For instance, while petitioner contends that its president's testimony that Kroger would save $80,000 per year as a result of the relocation was "uncontradicted" (Pet. 12), the ALJ found that this testimony was "a complete fabrication" and also cited testimony by Kroger's traffic analyst that Kroger had not requested the relocation (Pet. App. 134; see *id.* at 38). The court of appeals properly refused to disturb the Board's finding on this point as well as its many other similar judgments as to the probative value and weight of petitioner's evidence.

Petitioner's attack on the court of appeals' opinion rests upon its understandable unhappiness with factual findings that the Board made and the court of appeals upheld. The Board's findings are subject to review only to determine whether they are supported by "substantial evidence." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, this Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

2. Petitioner's argument that the court of appeals improperly shifted the burden of proof on the question of unlawful intent (Pet. 18-39) mischaracterizes that court's reasoning and confuses the respective roles of the Board and the courts of appeals under the analytical framework that this Court approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

An employer may violate Section 8(a)(3) of the NLRA without acting *solely* on the basis of an unlawful motiva-

tion. *Transportation Management Corp.*, 462 U.S. at 398. As the Act has been construed by the Board for over 50 years, the General Counsel need only prove, by a preponderance of the evidence, that anti-union animus was a "substantial" or "motivating" factor in the employer's decision. That understanding of the Act raises the possibility that violations will be found in mixed-motive cases, *i.e.*, cases in which discrimination against employees was motivated in part by unlawful anti-union animus and in part by legitimate economic concerns. In those cases, the Board has construed the statute as providing an affirmative defense to employers who can demonstrate that they would have engaged in the same action even in the absence of the unlawful intent to discourage union activity. This construction of the statute (*id.* at 401):

> permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c).[7]

Petitioner argues that the Board and the court of appeals departed from this framework by failing to "weigh[] the 'preponderance' of all the direct and the indirect evidence on the layoff and relocation issues before concluding that the General Counsel proved a *prima facie* case on those issues and that [petitioner] had the burden of proof on an affirmative defense." Pet. 23-24. This argu-

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[7] Section 10(c) of the Act, 29 U.S.C. 160(c), requires the General Counsel to establish an unfair labor practice by "a preponderance of the testimony * * *."

ment is unfounded, with respect to both the Board and the court of appeals.

a. The Board's lengthy opinion leaves no doubt that it carefully considered and rejected petitioner's arguments that business considerations underlay its decision to relocate to Madison Heights and lay off employees in June and August. Both the ALJ and the Board analyzed the economic considerations that petitioner advanced and concluded, in each instance, that petitioner's evidence was unworthy of belief or that those considerations did not account for the actions petitioner took. In fact, the Board concluded that those economic considerations were a pretext—*i.e.*, that this was not even a case in which an employer acted on the basis of mixed motives, as opposed to singleminded anti-union animus. See Pet. App. 35-36 (approving ALJ's findings that economic justifications advanced for June layoffs were "a pretext"); *id.* at 39 (petitioner "failed to demonstrate a legitimate reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights"). In any event, the Board's lengthy and detailed decision provides no support for the propositions that petitioner's economic justifications were ignored and that petitioner's liability turned on the placement of the burden of proof on the issue of intent.

b. The court of appeals applied the analytical framework approved by this Court in *NLRB* v. *Transportation Management Corp., supra,* to this decision. Pet. App. 19-21.[8] Citing an excerpt from the court's analysis,

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[8] In our view, the court would have been fully justified in upholding the Board's findings of violations on the ground that petitioner's asserted economic defenses were a pretext—*i.e.*, that petitioner had not even demonstrated that legitimate economic concerns played *any* part in its decisions to lay off employees in June and to relocate and scale down its Montvale operation. The Board reached that conclu-

petitioner complains that the court failed to weigh evidence of economic justifications in determining whether the General Counsel had made a *prima facie* case that anti-union animus was a "substantial" or "motivating" factor in petitioner's decisions to relocate and lay off most of the union's supporters in its Montvale operation. Pet. 19. In petitioner's view, the court erroneously held that a *prima facie* case had been established without "pretending to weigh all of the evidence of the layoff and relocation issues." *Id.* at 25; see also *id.* at 29.

The fundamental flaw in this argument is that it is not the court of appeals' function under *Transportation Management Corp.* to "weigh" evidence relevant to an employer's motivation for discrimination against its employees. Rather, the court's only task is to ascertain whether there was "substantial evidence" to sustain the Board's findings that an employer has acted on the basis of an unlawful motive and, in a case where an employer attempts to establish the affirmative defense recognized in *Transportation Management Corp.*, that the employer's

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sion, and there was substantial evidence to support its determination. Had the case been viewed in those terms, it would have been unnecessary for the court of appeals even to consider whether petitioner had established the affirmative defense recognized in *Transportation Management Corp.* See *Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982); *Babcock & Wilcox Co.*, 257 N.L.R.B. 707, 707 n.1 (1981); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983); *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38-39 (2d Cir. 1981); *The Artra Group* v. *NLRB*, 730 F.2d 586, 591-592 (10th Cir. 1984). Petitioner was not prejudiced by the approach the court of appeals took, however. To the contrary, the court's starting point—that this was a "dual motive" case governed by the order of proof approved in *Transportation Management Corp.* (see Pet. App. 19)—was more favorable to petitioner than the Board's findings justified.

action would not have occurred in the absence of that unlawful motive.

Viewed from this perspective, the court of appeals' analysis did not relieve the Board's General Counsel of the burden she carried before the Board—that is, to demonstrate by a preponderance of all of the evidence that anti-union animus was a "substantial" or "motivating" factor in petitioner's decisions to relocate and lay off employees. Rather, in view of the wealth of evidence of petitioner's threats and of its resistance to the union, and the insubstantiality of petitioner's asserted business justifications, the court found substantial evidence supporting the Board's conclusion that petitioner's economic defenses were insufficient. The substantial evidence standard of review did not require or permit the court to determine whether the Board had properly weighed the evidence. Under that standard, courts must defer to the Board's determinations with respect to the credibility of witnesses and the probative value of evidence introduced by the parties.

In short, petitioner's economic arguments were fully considered and rejected by both the Board and the court of appeals.[9] Moreover, the order of proof in cases brought under Section 8(a)(3) and the standard of review applicable to Board findings have been clearly established in prior decisions of this Court. Thus, the case raises no novel or unsettled issue of law of the sort appropriate for this Court's consideration.

3. Finally, petitioner contends that the order of proof in Title VII disparate treatment cases should be applied to

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[9] The fact that the court reversed one of the Section 8(a)(3) violations found by the Board—the violation based on the layoff of two employees in May—refutes any claim that the court of appeals denied petitioner the benefit of any defenses available within the framework of *Transportation Management Corp.*

alleged violations of Section 8(a)(3). Pet. 37. This case does not present that question. The order of proof applied in *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), sets forth the elements of and defenses to a circumstantial case of discriminatory intent for purposes of Title VII. Here, the Board's General Counsel did not rely on circumstantial evidence of anti-union intent; she introduced evidence of explicit threats and other resistance to the Union that fully justified the Board's conclusion that petitioner's motivation was unlawful. Thus, this case does not raise the question whether some version of the framework applied in Title VII disparate treatment cases should be applied to actions under the NLRA in order to facilitate proof of Section 8(a)(3) violations where only circumstantial evidence of anti-union animus is available. And, for the reasons set forth above, petitioner's contention that it was held to have violated Section 8(a)(3) on the basis of the placement of the burden of proof is completely without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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